IN THE

Supreme Court of the United States.

October Term, 1923.

No. 59

In the Matter of MARCUSE & COMPANY,
Alleged Bankrupts.

C. B. GILES, et al.,
Petitioners,
vs.
HENRY VETTE, et al.,
Respondents.

BRIEF AND ARGUMENT FOR RESPONDENTS, VETTE, ZUNCKER, REGENSTEINER, CLEMENT STUDEBAKER, JR., AND GEORGE M. STUDEBAKER.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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(Italics ours.)

STATEMENT OF FACTS.

We feel that a more comprehensive statement of facts should be made than has been made in the brief filed on behalf of petitioners, hence the following:

Marcuse was originally a partner of the firm of Von Frantzius & Co., a brokerage firm (Rec., 420,* 421)

*All references are to the pages of the record printed by the Clerk of this court.

which suspended business because of the death of the senior partner sometime prior to 1917. (Rec., 421, 422.) Marcuse was desirous to form a new firm to conduct the stock brokerage business in the quarters of the former firm in Chicago. During the early part of 1917, while he was engaged in settling up the affairs of the former concern, he was represented by Sidney Stein, a practicing lawyer of Chicago, since deceased, as his attorney and counsel. (Rec., 452, 454, 504.) Mr. Stein was also representing Finn as his attorney and counsel, and had for many years been the friend and attorney of Finn. (Rec., 246, 261, 267, 331.)

Messrs. George M. Studebaker and Clement Studebaker, Jr., reside at South Bend, Indiana. (Rec., 671.) Studebaker Bros. Trust was represented in Chicago by Scott Brown. (Rec., 594.) George T. Buckingham, of the firm of Defrees, Buckingham & Eaton, was his legal adviser. (Rec., 550.) Vette and Zuncker are residents of Chicago, and their legal advisers were Col. Milton J. Foreman, and his then partner, Egbert Robertson. (Rec., 245, 538, 539, 613.) Theodore Regensteiner, a resident of Chicago, was represented by Louis Grollman, a Chicago lawyer. (Rec., 246, 617.)

Arrangement of April 2, 1917.

Marcuse and Stein, in their efforts to form such new concern, had conferences with Regensteiner, Vette, Zuncker and Brown. As a result of these conferences, on April 2, 1917, Marcuse, Morris, Hecht, Finn, Vette, Zuncker, Regensteiner and Hoffman (who was connected with the firm of Defrees, Buckingham & Eaton, Rec., 550), met at the office of Col. Milton J. Foreman (Rec., 227, 258, 259, 267, 539.) There a limited partnership document was signed by Marcuse, Morris, Hecht, Finn,

Vette, Zuncker, Regensteiner and Hoffman. (Rec., 226, 227, 228, 267).) These persons also signed a certificate of limited partnership. (Rec., 234, 235.) These documents provided for the formation of a partnership of which Marcuse and Morris were general partners, and the other six persons, special or limited partners. Each of them were to make certain contributions to the capital, and Hecht, Finn, Vette, Zuncker, Regensteiner and Hoffman, were to have no liabilities beyond their contributions. This proposed limited partnership was, in a general way, similar to, though in some important respects different from, that afterwards formed under Exhibit A. (Petitioners' Exhibit 1, Rec. 228.)

Of this April 2, 1917 document nine original copies were signed. (Pet. Ex. 1, Rec., 228, and Zuncker's Exs. 1 to 8, Rec., 269-318.) In most instances on the trial counsel in examining witnesses spoke of eight copies (Zuncker's Exs. 1 to 8) but Mr. Robertson's testimony makes it clear that there were nine (Rec., 635), and nine copies are in evidence. They were left in escrow with Col. Foreman (Rec., 455, 497, 539) and it was agreed by all that they were not to be delivered and that no certificate was to be filed and no money was to be paid by anyone until the occurrence of certain events which Col. Foreman insisted, and all others agreed, should be conditions precedent to the proposed agreement's becoming effective for any purpose. They are in evidence as Zuncker's Exs. 9 to 16 (Rec., 318-325, 269, 539, 636.)

Abandonment of Arrangement of April 2, 1917.

Shortly thereafter Marcuse went to New York. On his return he and Stein, his attorney, advised all parties that this proposed agreement could not become effective *and must be abandoned.* (Rec., 454, 498, 499, 500, 547,

549.) The reason was, as shown by a telegram, that the New York Stock Exchange "would not object to a firm having two special partners if they were not engaged in any other business and were otherwise passed on favorably" by the Stock Exchange Committee. (Rec., 262, 496.)

This then contemplated limited partnership would have had more than two special partners. (Pet. Ex. 1, Rec. 228.) Moreover, Hoffman (Rec., 636, 670), Vette, Zuncker, (Rec., 330, 384) and Regensteiner (Rec., 330) were actively engaged in other businesses and were, therefore, ineligible to become special partners.

Accordingly, none of the documents held by Col. Foreman were delivered, no certificate of partnership was filed, no money was paid in (Rec., 498, 535) and nothing further was done with reference to this uncompleted transaction. (Rec., 328, 498, 499, 575, 678, 685.)

Later Messrs. Stein and Robertson formally canceled all of these documents while still held in the escrow custody of Col. Foreman, by tearing off part of the signatures. (Rec., 619, 620, 634, 635.)

These letters setting forth the terms of the escrow were likewise canceled by Messrs. Stein and Robertson, by tearing off the signatures. (Rec., 619, 620.) (Though unimportant, it was shown that one of the conditions precedent never occurred until some time after the cancellation just related, viz.: the arrangements for the delivery to Ben Marcuse, as trustee, of all of the Von Frantzius estate, with the consent and approval of the Probate Court, was not concluded until August 1, 1917.) (Rec., 487, 498.)

Change of Attitude.

Some weeks after this proposed agreement had been abandoned Messrs. Marcuse and Stein called on Brown and his counsel, Buckingham. From them was solicited Studebaker financial aid in a new entity which Marcuse desired to form, following the abandonment of the one just referred to. Marcuse and Stein were then endeavoring to organize a firm with two special partners and they wished Hoffman or some one else representing Studebaker interests to be one of such special partners, having and interest of $100,000. (Rec., 552, 553, 637.)

They were told by Buckingham that neither Hoffman nor anyone representing Studebaker interests would become a limited partner in the proposed enterprise (Rec., 552, 553, 637, 638); that Buckingham (who was not present when the first arrangement was attempted, Rec., 550) was strongly opposed to his clients' becoming limited partners (Rec., 553, 637); that such relation, in his judgment, involved too much risk. They were told that if any money was furnished it would be by Studebaker Bros. Trust (Rec., 553, 637, 638) and that it, being a trust fund, must have some sort of a negotiable certificate (Rec., 553, 637, 638) issued by a trustee, representing the money contributed (Rec., 553), which it could hold as an investment (Rec., 638), or could transfer and sell; that such certificate must represent an interest only in profits and income after they had been separated and segregated from the partnership activities, and that only on that basis would any money be invested, and in that event, only $50,000, and not $100,000. (Rec., 553, 599, 637.) Marcuse and Stein did not then agree to this. (Rec., 553.) Later Buckingham was informed that Hecht and Finn would become special partners with Marcuse and Morris, and Stein drew up and submitted to Buck-

ingham a draft of a trust agreement. Stein went to Foreman and Robertson and informed them that this trust plan was the only one which Buckingham would consider, and that no Studebaker money could be enlisted on any other basis. (Rec., 621.)

Zuncker refused to have anything to do with it as a partner (Rec., 393) and he represented Vette also (Rec., 547, 619).

Hecht-Finn Trust Agreement.

Later, Stein presented to Buckingham and Robertson, separately, a typed draft instrument designed by him to effectuate the trustee certificate plan, under which Hecht and Finn were to act as trustees, and to issue trust certificates. (Rec., 554, 614, 615.) The draft instrument then submitted by Stein is Zuncker's Exhibit 36. (Rec., 554, 638.)

Buckingham objected to this draft (Rec., 554) because it did not provide for the intervention of a corporate trustee for the distribution of the funds, and because he desired it more sharply defined that the interest of the certificate holders was only in profits and proceeds *after* they were segregated from the partnership. (Rec., 563, 564.) Accordingly, and to meet these objections, Stein presented to them a second draft. (Rec., 554, 559, 563.) This draft is Zuncker's Exhibit 37. (Rec., 559, 638.) It came nearer meeting the objections made to the former draft (Rec., 563, 564), but was still unsatisfactory to Buckingham and Robertson for the same reasons (Rec., 563, 564, 614, 615.)

Thereupon Buckingham and Hoffman proceeded to formulate a document which would more nearly express their views. (Rec., 638, 639.) When it had been drafted Hoffman, Robertson and Stein went over it together.

(Rec., 615, 616, 638, 639.) Robertson made certain interlineations in it. (Rec., 615, 622, 623, 638.) This draft is Zuncker's Exhibit 38. (Rec., 565, 638.) This final draft was delivered to Stein, who caused it to be typed and it became the executed document known as the Hecht-Finn trust agreement (and referred to herein as "Exhibit B"). (Rec., 615, 616, 639.) Louis Grollman, attorney for Regensteiner, went over the document, and it was satisfactory to him. (Rec., 617.)

In the draft finally revised and agreed upon by Buckingham, Hoffman, Robertson and Stein, and approved by Grollman, Section 6 appears for the first time, viz.:

> **"The holders of Trust Certificates shall have no right, title or interest, directory, proprietary or otherwise, in the said copartnership or in or to the property or assets of said copartnership, the entire right, title and interest therein and thereto, both legal and equitable, being vested in the Trustees, nor shall the holders of Trust Certificates by the acceptance thereof be construed to have assumed any liability whatsoever with respect to said trust or said copartnership, but the interest of each and every holder of Trust Certificates shall consist solely of the right to receive from the trust company his proportionate share of the net part or parts of the Trust Fund from time to time actually received by the Trust Company, including the proportionate share of such holder of the corpus of said fund upon the dissolution of said copartnership, and such right shall be, and be taken to be, personal property and may be assigned and transferred as such subject to the limitations herein and in said Trust Certificates set forth and contained."** (Rec., 568, 569.)

This final revision was made on Friday, June 29, 1917. (Rec., 616.)

Selection of Hecht and Finn.

Neither Vette, Zuncker, Regensteiner, Hoffman nor the Studebakers, nor any one representing any of them, ever solicited Hecht or Finn to become a special partner, or had anything whatever to do with inducing them to become such. (Rec., 256, 267, 327, 328, 331, 465.)

On the contrary, it appeared by the testimony of Finn, that Sidney Stein and Elias Mayer, a partner of Stein, and also Marcuse, persuaded him to become a limited partner (Rec., 256, 267, 328, 331) and from the testimony of Marcuse, that he (Marcuse), by personal selection, induced both Hecht and Finn to become special partners. (Rec., 460, 465, 500.)

Execution of the Definitive Agreements, Exhibits A and B.

On Saturday, June 30, 1917, Hoffman took to the office of Marcuse the check of Studebaker Bros. Trust for $50,000, payable to himself. (Rec., 250, 639, 640.) Robertson took there the checks of Vette and Zuncker, payable to Hecht and Finn (Rec., 248, 249, 617, 618, 619); Grollman took there, on behalf of Regensteiner, the check of Regensteiner Colortype Co., also payable to Hecht and Finn. (Rec., 341, 647.) Robertson and Hoffman examined the contract of limited partnership, *Exhibit A,** (Herein referred to as "Exhibit A") which Stein produced, and also examined *Exhibit B** and compared it with their final draft, Zuncker's Exhibit 38 (Rec., 618, 640), after which Marcuse, Morris, Hecht and Finn executed the articles of limited partnership, Exhibit A, also referred to as Petitioner's Exhibit 3 (Rec.,

*A copy of the limited partnership agreement, Exhibit A, is set forth in the appendix to this brief, p. i, and a copy of the Hecht-Finn Trust Agreement, Exhibit B, appears in the appendix, p. xii. These documents are referred to throughout this brief as Exhibits A and B, respectively.

238, 239, 20, 490), and a limited partnership certificate (Rec., 239, 490.) Hecht and Finn and a representative of Chicago Title and Trust Co. executed the trust agreement, Exhibit B, also referred to as Petitioner's Exhibit 6 (Rec., 243, 244, 26, 490, 618, 640), and the checks of Vette, Zuncker, Regensteiner Colortype Co., and Studebaker Bros. Trust were all delivered to Hecht and Finn, the latter check duly endorsed by Hoffman to the order of Hecht and Finn. (Rec., 489, 617-619, 647, 648, 673.)

None of these respondents were present (Rec., 639, 647), and none of them met or conferred with Hecht or Finn concerning the transaction, which was consummated. The latter were acting upon the advice of their own counsel, as was also Marcuse. (Rec., 328, 329, 331, 465, 499, 500.)

Of the certificates issued under the Hecht-Finn Trust Agreement, the one issued to Regensteiner for 57 shares was immediately surrendered, and two certificates were issued in lieu thereof, one to Regensteiner for 37 shares, and one to Grollman for 20 shares. (Rec., 337, 605-608.) The certificate issued to Hoffman for 100 shares was by him assigned to Gardner, an official of the Chicago Title & Trust Company (Rec., 610, 640), and a new certificate was issued to Gardner, who endorsed it in blank and delivered it to Chicago Title and Trust Company, which has since held it as a part of the securities owned by Studebaker Bros. Trust. (Rec., 610-612.)

Studebaker Bros. Trust.

Studebaker Bros. Trust is an investment fund, the legal and equitable title to which is held under deed of trust by Chicago Title & Trust Company, trustee, for the ultimate benefit of various persons, including, among

others, Clement Studebaker, Jr., and George M. Studebaker. This trust instrument is in evidence as Hecht's Exhibit 1 (Rec., 576). This trust was created long before the creation of Marcuse & Company and without reference to that firm.

Filing of Limited Partnership Certificate.

Under the Limited Partnership Act of 1874 in force June 30, 1917, the limited partnership certificate executed by Hecht and Finn was required to be filed with the County Clerk of Cook County, Illinois. Mr. Sidney Stein (attorney for Marcuse), who prepared the limited partnership agreement (Exhibit A) and this limited partnership certificate, undertook to file this certificate. The county clerk's office closed before the certificate could be filed (Saturday afternoon being a half holiday) and, therefore, he did not file the certificate until the following Monday, July 2nd. (Rec., 241-243, 337.)

The certificate was in accordance with the provisions of the Limited Partnership Act in force in Illinois on June 30, 1917. In this certificate Hecht and Finn were named as limited partners and the amount of their contributions as $95,000 each. (Rec., 242.)

Contributions of Hecht and Finn.

By the terms of Exhibit A, Hecht and Finn obligated themselves to contribute, as special partners, to the firm of Marcuse & Co. the sum of $190,000, or $95,000 each. (Rec., 21.) After the checks of Vette, Zuncker, Regensteiner Colortype Co. and Studebaker Bros. Trust were delivered to them, Hecht and Finn made their contribution to the capital of Marcuse & Co., by endorsing said checks to the order of Marcuse & Co., and delivering them, together with their own checks, payable to Marcuse & Co., for the balance of said $190,000 to Ben

Marcuse, general partner. (Rec., 246-251, 341.) Instead of depositing the checks payable to them, and drawing their own checks for the full amount of $190,000, which they might well have done, they endorsed and turned over to Marcuse & Co. the checks they had received as trustees. The partnership began to do business on Monday, July 2, 1917. (Rec., 365.)

Hecht and Finn Held Out as Limited Partners Only.

Hecht and Finn were named as limited partners in the limited partnership certificate filed and on the firm stationery and on the firm business cards. (Rec., 523, 528, 348.) *They were held out to the world as limited partners. No one considered them as anything else. They did not assume to be anything else. Vette, Zuncker, Regensteiner, Hoffman and the two Studebakers did not appear in connection with the firm. No creditor of Marcuse & Co. traded with that firm, on account of the credit of any of these people, or had any knowledge of the source of the money which Hecht and Finn contributed to the capital of the firm.*

Dividend Payments.

The dividends paid upon the limited partnership capital in the firm were paid to Chicago Title & Trust Company, trustee for that purpose, under the Hecht-Finn trust agreement, and were thus segregated from the assets of the firm and by that company distributed among the then certificate holders in accordance with the terms of the Hecht-Finn trust agreement (Rec., 244, 28) in every case but one. (Rec., 528-530.) A four per cent dividend was declared in January, 1918. Vette and Zuncker were then customers of Marcuse & Co. and had

trading accounts with that firm. Instead of paying the amount of this dividend on the $190,000 to Chicago Title & Trust Company (as Marcuse & Co. should have done), Marcuse apportioned this according to the amounts of the then outstanding certificates and credited the amount apportioned to the Zuncker certificate to Zuncker's trading account and the amount apportioned to the Vette certificate to Vette's trading account. (Rec., 521.) There is nothing in the record to indicate that either Vette or Zuncker knew, at that time, that this had been done. Zuncker had no recollection of it. (Rec., 407, 408.) The amounts apportioned to the Finn certificate, the Regensteiner certificate and the Israel Grollman certificate were sent to each of them by the checks of Marcuse & Co. (Rec., 519, 521.) For the amount due on the certificate held by Studebaker Bros. Trust, Marcuse sent a check to Scott Brown, who is the manager of that trust. Brown refused to receive this check and returned it to Marcuse & Co. because the money should have been paid to Chicago Title & Trust Company as trustee under the Hecht-Finn Trust. (Rec., 529, 530.) Marcuse then, instead of making out a check payable to Chicago Title & Trust Company, made out another check to Frank G. Gardner, the official of the Chicago Title & Trust Company (Rec., 530), to whom a trust certificate was issued upon a surrender and cancellation of the Hoffman certificate as above explained (Rec., 611, 612). Gardner endorsed this check and turned it over to Chicago Title & Trust Company and that company put it through the bank (Rec., 532), rather than returning it to Marcuse & Co. and insisting that another one be made out to Chicago Title & Trust Company. Marcuse, when asked to explain why the attempt was made to handle this dividend in the manner as here explained, said that Hecht had sug-

gested that it might save the expense of paying an extra commission to Chicago Title & Trust Company and said that Marcuse & Co. sent these checks out direct, but notified the Chicago Title & Trust Company that they had done so. (Rec., 529.) This was the only dividend he ever attempted to handle in that way. (Rec., 530.)

No Conflict of Evidence.

There is no conflict of evidence as to any material fact. The facts were proven without controversy as to their truth, but only as to their materiality or relevancy.

The Illinois Limited Partnership Act of 1917.

The business continued until March 11, 1920, when a petition in bankruptcy was filed in the United States District Court at Chicago. (Rec., 33-35.)

On June 28, 1917, the Illinois legislature passed a new General Partnership Statute and a new Limited Partnership Statute, being the "Uniform Acts" originating with the American Bar Association, and the committee on Uniform State Legislation. These acts became effective on July 1, 1917, which was Sunday. (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a. Cahill's Ill. Rev. Stat. 1921, Ch. 106½, Smith's Ill. Rev. Stat. 1921, Ch. 106a.) Thus the old statute was in force on Saturday when the limited partnership contract, and the Hecht-Finn Trust Agreement were executed. If the limited partnership certificate had been filed with the clerk of the County of Cook that day the limited partnership would have become effective, but on the following Monday (July 2nd) when the certificate was filed, the old Limited Partnership Act had been superseded by the new Limited Partnership Act. By the terms of the old

Illinois Limited Partnership Act, a limited partnership could be formed to carry on a brokerage business. A limited partnership would become effective when and if, and only when and if, the certificate thereof was filed with the county clerk. (Hurd's Rev. Stat. of Ill. 1915-1916, Ch. 84, Secs. 6, 8.*) The new Limited Partnership Act, of 1917, which superseded the older one, over Sunday, did not provide for limited partnerships to carry on a brokerage business.

Pleadings.

The original petition in bankruptcy was filed on March 11, 1920, against Marcuse, Morris, Hecht and Finn, as copartners doing business as Marcuse & Co. (Rec., 33.)

One Lachman filed an intervening petition against Marcuse, Morris, Hecht and Finn, in which he set forth the situation with reference to the new Limited Partnership Act's superseding the old act and that the certificate thereof had not been filed until after the new act became effective and claimed that Marcuse, Morris, Hecht and Finn were, therefore, all liable as general partners. But no reference was made to any one else. (Rec., 42.)

Until the present litigation was started neither Hecht nor Finn nor any of these respondents knew that the limited partnership certificate had not been filed until Monday, July 2, 1917, nor were they aware of the legal effect of that fact until the commencement of this litigation. (Rec., 264, 265, 654.) Upon being advised of this claim by counsel, Hecht and Finn promptly tendered to the bankruptcy receiver, $46,000, be-

*These sections of the statute are set forth in Petitioner's Brief, p. 4.

ing an amount larger than the profits which had been paid out to them by the partnership, with interest (Rec., 654, 655), together with a document of renunciation of all profits and benefits in compliance with Section 11 of the Uniform Limited Partnership Act of Illinois. (Rec., 654, 58, 59.) Later this money was paid to the clerk of the District Court. (Rec., 70.)

Section 11 of the Uniform Limited Partnership Act is as follows:

> "A person who has contributed to the capital of a business conducted by a person or partnership *erroneously believing* that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income." (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 55. Smith's Ill. Rev. Stat. 1921, Ch. 106½, Sec. 54, Cahill's Ill. Rev. Stat. 1921, Ch. 106a, Sec. 55.)

In the answer of Hecht and Finn to the original and intervening petitions (Rec. 56, 59, 60, 62, 71, 78, 85, 91) they set forth, among other things, in substance the provisions of Section 11 of the new Limited Partnership Act and the tender and renunciation, etc., which they had made upon learning of this situation, and that at no time had either of them participated in the management, control, operation or conduct of the business of said copartnership or taken any action in excess of action rightfully permitted to a limited partner in a limited partnership, etc.

On April 30, 1920, Fiegel, one of the original petitioning creditors, and Jacobs and Frazee, intervening peti-

tioning creditors, filed an amended petition (Rec. 184) the parties defendant to which were:

(a) Marcuse and Morris;

(b) Hecht and Finn;

(c) Vette, Zuncker, Regensteiner, Hoffman, Clement Studebaker, Jr., and George M. Studebaker.

This amended petition alleged merely that Marcuse, Morris, Finn, Hecht, Regensteiner, Vette, Zuncker, Hoffman, Clement Studebaker, Jr., and George M. Studebaker, doing business under the trade name of Marcuse & Co. had their principal place of business in Chicago and were engaged in buying and selling stocks and other securities; that the petitioning creditors had provable claims against them, etc., and that each of them individually and as copartners were insolvent and had committed acts of bankruptcy and praying that they be individually and as copartners as Marcuse & Co. adjudged to be bankrupt.

Vette, Zuncker, Regensteiner, Hoffman, George M. Studebaker, and Clement Studebaker, Jr. (now for the first time brought into the case by petitioning creditors) filed their separate answers to the amended petition (Rec., 189, 195, 201, 205, 210, 215) setting forth the facts with reference to the organization of the firm, the Hecht-Finn Trust, the purchase of certificates, etc., and denying that they were members of the firm of Marcuse & Co. either limited or general, or liable for the debts of that firm.

Evidence Improperly Admitted.

On the hearing the petitioning creditors, over the objections of these respondents, that the question whether these respondents are partners in the firm of Marcuse

& Co., and liable for the debts of that firm, ***must be determined from the Limited Partnership Agreement, Exhibit A, and the Trust Agreement, Exhibit B,*** and that all evidence relating to conversations and transactions prior to the execution of these instruments was inadmissible (Rec., 227, 228, 256, 257, 373, 374, 378, 381, 382, 390, 396, 453, 538), introduced evidence as to the various conversations, incidents, transactions and negotiations occurring prior to June 30, 1917, as above set forth. The court admitted the evidence over these objections, and later refused to strike it from the record. (Rec., 538.) These respondents (not conceding the admissibility of such evidence, but adjusting themselves to the theory upon which the court proceeded with the hearing) introduced other evidence as to matters and things occurring prior to June 30, 1917. (Rec., 381, 571, 572.)

Order of the District Court.

On this state of the record Landis, J., by an order entered July 1, 1920 (Rec., 222), found that the firm of Marcuse & Co. was composed of Ben Marcuse, Lew H. Morris, Joseph M. Finn, Frank A. Hecht, Clement Studebaker, Jr., George M. Studebaker, Theodore Regensteiner, Henry Vette, and Peter M. Zuncker and referred the cause to a referee for a hearing on the assets and liabilities up to March 11, 1920, when the original petition in bankruptcy was filed. Hoffman was not included in this order. The court thus held that all of these parties were general partners and directed an inquiry to determine whether the firm of Marcuse & Co. and all of these individuals as general partners was or was not insolvent.

Decision of Circuit Court of Appeals.

A petition to review and revise was filed to procure a review of this order and the Circuit Court of Appeals held originally and afterward on elaborate application for a rehearing:

(1) That Hecht and Finn in good faith believed themselves to be limited partners in a limited partnership.

(2) That this being the case their complete compliance with Section 11 of the new Uniform Limited Partnership Act exempted them from liability.

(3) That even if this were not so the Uniform General Partnership Act prevented their liability as general or any kind of partners.

(4) That Hecht and Finn not being liable as general partners, of course, the other respondents whose only relation was to Hecht and Finn could not be held either as general or limited partners or as any partners.

Having reached this conclusion the Court of Appeals found it unnecessary to pass on the further contentions set up by the other respondents. These undisposed of defenses of Vette, Zuncker, Regensteiner and the two Studebakers were:

(1) That respondents Vette, Zuncker and Regensteiner were *cestuis qui trust* under the Hecht-Finn Trust Agreement and never became partners either general or limited and that the Studebakers were not even certificate holders.

(2) That even if Hecht and Finn were held to be general partners with Marcuse and Morris, yet these respondents, if partners at all, could be nothing more than subpartners of Hecht and Finn and that as such subpartners they would not be members of the firm of Marcuse

& Co. and would not be liable to the creditors of that firm for its debts.

In addition to these defenses the Messrs. Studebaker contended that even if their preceding mentioned defenses were inadequate, they were not liable because they had not even purchased a trust certificate; that the money with which said certificate was purchased was the property of Studebaker Bros. Trust, a fund the legal title to which was in a trustee and that if the purchase from Hecht and Finn of a trust certificate operated to make the purchaser a general partner in Marcuse & Co. such purchaser was the trustee and the trust fund (which, operating through Scott Brown, its manager, had bought the certificate) and not the Studebakers as individuals.

None of these additional defenses of Vette, Zuncker, Regensteiner or the Studebakers became necessary to be passed on by the Court of Appeals.

BRIEF.

POINTS AND AUTHORITIES.

The writ of certiorari was improvidently issued and should be dismissed.

Layne & Bowler Corporation v. *Western Wells Works* (April 9, 1923), 67 L. Ed. (U. S.), 497.

I.

Hecht and Finn are not in law general partners of Marcuse & Co. and liable as such to its creditors, and therefore, irrespective of all other questions, these respondents cannot be held on any theory to be partners of Marcuse & Co.

(A) Because there has been a full compliance with Section 11 of the Uniform Limited Partnership Act of Illinois.

Section 11, Limited Partnership Act; Hurd's Revised Stat. of Ill. 1921, Chap. 106a, Sec. 55; Smith's Ill. Rev. Stat. 1921, Ch. 106½, Sec. 54; Cahill's Ill. Rev. Stat. 1921, Chap. 106a, Sec. 55.

Commercial National Bank & Trust Co. 239 U. S. 520, 526, 528, 529.

Explanatory note to Uniform Limited Partnership Act, William Draper Lewis, draftsman, appendix to this brief, p. xxiii.

Uniform Limited Partnership Act, by William Draper Lewis, Vol. 65 Pa. Law Review, 715; appendix to this brief, p. xxvii.

The Nature of Limited Liability under the uniform Limited Partnership Act, University of Pennsylvania Law Review, Jan. 1923, Vol. 71, page 150; appendix to this brief, p. lii.

(B) Because under the provisions of the Uniform General Partnership Act of Illinois, neither Hecht and Finn nor these respondents can be held liable as general partners. This is true irrespective of Section 11 of the Limited Partnership Act.

Sections 4 (1), 6, 7, Illinois General Partnership Statute; Smith's Illinois Revised Statutes, 1921, Secs. 4, 6, 7, Ch. 106½, p. 1461.

It is a cardinal principle of law that persons are not partners unless they *intend* to be such. Every partnership rests on the mutual consent of the members.

Ruling Case Law, Vol. 20, p. 831.
Phillips v. *Phillips*, 49 Ill. 437, 439.
Bushnell v. *Consolidated Ice Machinery Co.* 138 Ill. 67, 74, 75.
Grinton v. *Strong*, 148 Ill. 587, 596.
Reed v. *Engle*, 237 Ill. 628, 631.
Goacher v. *Bates*, 280 Ill. 372, 376.
London Assurance Co. v. *Drennen et al.* 116 U. S. 461, 472.

II.

Even if Hecht and Finn are liable as partners (which is denied) these respondents are not so liable because:

A. Under the written and signed instrument, Exhibit B, Hecht and Finn are trustees and the certificate holders thereunder are *cestuis que trust*. Under the terms of that instrument no partnership relation is created between Hecht and Finn and these respondents.

Crehan v. *Megargel*, 192 N. Y. S. 290; 234 N. Y. 67; 136 N. E. 296.
Williams v. *Milton*, 215 Mass. 1, 10, 11; 102 N. E. 355, 358, 359.

Crocker v. *Malley* (1919), 249 U. S. 223, 232, 233.

Mayo v. *Moritz*, 151 Mass. 481; 24 N. E. 1083.

Johnson v. *Lewis*, 6 Fed. 27, 28.

Wells-Stone Mercantile Co. v. *Grover*, 75 N. W. (N. Dak.), 911, 916.

Jones v. *Gould*, 209 N. Y. 419, 424.

Home Lumber Co. v. *Hopkins* (1920), 190 Pac. (Kans.), 601, 604.

R. I. Hospital Trust Co. v. *Copeland*, 98 Atl. (R. I.), 273, 279.

Additional authorities cited in this brief, pp. 75-77, 94-97, 100, 101

B. If the certificate holders, by the terms of Exhibit B, are *partners* with Hecht and Finn (which is denied), such partnership is among and between themselves alone, and is therefore in law a *subpartnership;* and as *subpartners* they are not partners of the firm of Marcuse & Co. or liable to its creditors.

Burnett v. *Snyder*, 76 N. Y. 344.

Burnett v. *Snyder*, 81 N. Y. 550; 37 Am. Rep. 527, 531.

Bybee v. *Hawkett* (C. C. A. 6), 12 Fed. 649.

Bank v. *Morris*, 43 Legal Intelligence (Pa.), 56.

Rockafellow v. *Miller*, 107 N. Y. 507.

O'Connor v. *Sherley*, 107 Ky. 70; 52 S. W. 1056.

Setzer v. *Beale*, 19 W. Va. 274, 287, 288.

Meyer v. *Krohn*, 114 Ill. 574, 581.

Crehan v. *Megargel*, 192 N. Y. S. 290.

Bates, Law of Partnership, p. 169.

Cyc. of Law and Procedure, Vol. 30, p. 382.

Ruling Case Law, Vol. 20, p. 1074.

C. The Studebakers were not even certificate holders under Exhibit B. They had no connection with the firm of Marcuse & Co. and cannot be held liable as partners in that firm on any theory.

ARGUMENT.

Writ of Certiorari Improvidently Issued and Should Be Dismissed.

On the application for the issuance of the writ of certiorari we urged that the application should be denied.

We pointed out to the court that:

(a) There is no question of public importance involved in this case.

(b) The case does not involve a Federal question in any sense.

(c) The fact that there was a dissenting opinion in the Court of Appeals was no basis for the allowance of the writ.

(d) There is no conflict of opinion between Circuit Courts of Appeals or between any Circuit Court of Appeals and a state court.

(e) The amount involved is no ground for certiorari.

(f) No question of uniformity arises.

The decision of the Court of Appeals turned on the provisions of the Limited Partnership Act and General Partnership Act. No other Court of Appeals has thus far passed upon these questions.

The fact that this case involves among other things an application of provisions of the so-called Uniform Limited Partnership Act and Uniform General Partnership Act is no ground for this court reviewing this case. So-called uniform statutes exist on many subjects, and, while uniformity of decision is of course desirable, if this court were to take upon itself the burden of re-

viewing cases simply because they involved the application of some of these statutes, an enormous volume of litigation would find its way upon the court's docket which otherwise would not be there.

No question of interest to the public is involved in this case any more than in any other case where a large amount of money or where the application of some uniform statute is involved.

There is no Federal question in the case. It is primarily a question of contract relationship and involving the application of state statutes. In a word, it is a case of private contract rights and state statutes.

Since the writ of certiorari issued in this case, this court rendered its opinion in

> *Layne & Bowler, Corporation,* v. *Western Wells Works,* decided on April 9, 1923, 67 L. Ed. (U. S.) 497.

In the Layne case the court issued the writ. It was an ordinary patent case. The writ was issued with the thought that there was a conflict between two of the Circuit Courts of Appeals. Upon a consideration of the case this was found to be a misapprehension and in an opinion written by Mr. Chief Justice Taft, the writ was dismissed as having been improvidently issued, and this court said (p. 499):

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari *except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit*

Courts of Appeal. The present case certainly comes under neither head."

And the court cited and we here cite:

Furness W. & Co. v. *Yang-Tsze Ins. Ass'n*, 242 U. S. 430, 61 L. Ed. 409, 37 Sup. Ct. Rep. 141.

United States v. *Rimer*, 220 U. S. 547, 55 L. Ed. 578, 31 Sup. Ct. Rep. 596.

These were cases in which the court issued the writ and later upon further consideration dismissed the writ.

This court has refused to issue a writ of certiorari in a great many cases in which there was a dissenting opinion in the Circuit Court of Appeals. (See pp. 16, 17 of our brief in opposition to the application for the writ.)

We respectfully urge that the writ issued in this case should be dismissed.

THE ISSUES.

The opinion of the Circuit Court of Appeals begins as follows:

> "The primary issue is (1) whether, under above stated facts, *petitioners* are liable as general partners with Marcuse and Morris. (2) Then there is the question whether, in case Hecht and Finn are so liable, the liability can be extended also to the other petitioners, who do not by the finally executed contract purport to have entered into any partnership arrangement of any sort, and (3) the further question whether the Studebakers can in any event be held general partners, in view of the fact that the Studebaker contribution was made by and for 'Studebaker Bros. Trust.'" (Numerals ours.) (Rec., 739.)

We accordingly proceed to discuss these questions in the order considered by the court:

I.

NEITHER HECHT AND FINN NOR THESE RESPONDENTS WERE GENERAL PARTNERS OF MARCUSE & CO.

A.

UNDER SECTION 11 OF THE UNIFORM LIMITED PARTNERSHIP ACT HECHT AND FINN ARE NOT LIABLE AS GENERAL PARTNERS OF MARCUSE & CO., AND, THEREFORE, THESE RESPONDENTS ARE NOT LIABLE.

As well stated by the court, the primary question presented by this record is whether or not respondents are liable to bankruptcy creditors because they are general partners of the firm of Marcuse & Co.

The contention that they were general partners and therefore so liable, rests upon the single fact that Stein, attorney for Marcuse, failed to file the certificate of limited partnership on Saturday afternoon, June 30th, but filed it on Monday, July 2, 1917.

If the county office had been open on Saturday afternoon, June 30th, Stein would have filed the certificate and Hecht and Finn would have been limited partners by virtue of those articles, and not general partners.

Because Stein filed the certificate on Monday morning, July 2nd, *after* the 1874 Act was repealed, petitioners claim that Hecht and Finn became general partners, and that the other respondents also thereby became general partners and therefore liable as such.

We contend and the Court of Appeals held, that Hecht and Finn were not general partners of Marcuse & Co., and are not liable to its creditors, and that, therefore, all other questions of law and of fact are inconsequential, for no one can seriously contend that the

other respondents are liable for the debts of Marcuse & Co. if Hecht and Finn are not liable. Hecht and Finn might be held liable and the other respondents not liable, but the converse of this could not be true.

The Limited Partnership Agreement was executed by Marcuse, Morris, Hecht and Finn (and by them only) on June 30, 1917.

On that day the Act of 1874 was in force. That act provided that a limited partnership might be formed for the purpose of carrying on any business, and that the liability of any partner might be limited by such agreement, and that such limited partner would be liable to the creditors of the firm to the ext[illegible] only of his contribution to the capital of the firm.*

It also provided that a certificate of limited partnership should be filed of record in the county.*

It also provided that the limited partnership agreement *could become effective* only at the time when the certificate and affidavit were filed.*

The Limited Partnership Agreement and certificate were executed and acknowledged and the bank checks were delivered by Hecht and Finn to Marcuse on June 30, 1917, which was Saturday.

As of date July 1, 1917, the 1874 act was repealed. Petitioning creditors claimed that, *therefore,* the agreement, limiting the liability of Hecht and Finn, *never became effective under the* 1874 *act.*

It was claimed by petitioning creditors, and conceded by all, that the limited partnership contract never became effective as such within the terms or within the life of the 1874 act. The final and vital element in that attempt did not take place until after that statute had been

*These sections of the statute (Secs. 2, 4, 6, 8) are quoted in petitioner's brief, p. 4.

repealed. The firm began business on July 2, 1917. *All its dealings were on and after that date.*

The 1874 act was repealed by a specific provision in the so-called "Uniform Limited Partnership Act," which became effective as an Illinois statute on July 1, 1917.

This new act provided a wholly new scheme for limited partnerships, and was in force on July 1, 1917, and afterward. Section 11 of the Uniform Limited Partnership Act is as follows:

> "A person who has contributed to the capital of a business conducted by a person or partnership *erroneously believing* that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income." (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 55.)

Hecht and Finn together had contributed $190,000 to the going business which, beginning on July 2, 1917, was conducted as Marcuse & Co. There can be no doubt that they "believed" that they were "limited partners in a limited partnership." The certificate filed with the county clerk so recited, and this gave public notice (Rec., 241-243) as did also the notices which they caused to be published (Rec., 525). They so held themselves out to the public, and to the customers of that firm, on letterheads, cards and otherwise (Rec., 348, 528), so that everybody clearly understood what they supposed, and what all supposed, their status in that firm to be. No one has claimed otherwise. They did not attempt to exercise any of the rights of general partners.

Compliance with Section 11.

Accordingly, when they discovered their defective status as limited partners, they promptly tendered to the receiver of the bankrupt firm $46,000 in cash, which was an amount fully sufficient to cover all of the money which the firm had paid to them *as profits due to them as special partners, plus interest on the same,* and plus a margin for safety, together with a formal renunciation of all profits, rights and claims in the partnership or its property (Rec., 654, 655, 58, 59), and later paid this money to the clerk of the District Court (Rec., 70).

Application of Section 11.

The language of Section 11 clearly covers this case. Hecht and Finn had contributed to the capital of the business conducted by the firm of Marcuse & Co., and they erroneously—although sincerely—believed that they were limited partners in a limited partnership. When they discovered that their belief was erroneous, they adopted the statutory means of preventing themselves from becoming general partners if indeed they did not go further than Section 11 requires.

The language of Section 11 is clear and plain, and is not susceptible of being misconstrued. However, in reinforcement of the plain language, we now bring to the court's attention the genesis, history, and purpose of the act of which Section 11 is a part.

History and Purpose of Uniform Limited Partnership Act.

The American Bar Association has a committee on uniform legislation. That body and its committee have, for many years, been engaged in an attempt to procure

the passage, by all states, of *uniform* statutes on specific subjects. Pursuant to that policy, it has procured in Illinois and elsewhere the passage of many *uniform* acts.

In line with its general campaign on this subject, it procured in various states the passage of a statute providing for a "Commission for the Uniformity of Legislation in the United States."

Pursuant thereto, the Illinois legislature, in 1907, passed an act creating a Commission on Uniform Legislation and prescribing its duties. (Hurd's Rev. Stat. of Ill. 1921, Ch. 131, Secs. 18, 19, p. 3152.) Under this act, commissioners were appointed to represent Illinois.

These commissioners met with similar commissioners representing all the states of the Union, composing "The National Conference of Commissioners on Uniform State Laws."

The twenty-sixth annual meeting of that body was held at Chicago, August 23-29, 1916.

That body then had a "Committee on Commercial Law," to which had been delegated the duty of preparing a "Uniform Limited Partnership Act."

At this 1916 meeting, this committee reported to the conference the text of the "Uniform Limited Partnership Act" (which afterward verbatim became the Illinois statute) with an "explanatory note" setting forth the objects and purposes of the proposed act. This "explanatory note" was signed by Prof. William Draper Lewis, Dean of the College of Law of the University of Pennsylvania, who was draftsman for the committee, and is set forth in the appendix to this brief, p. xxiii.

The draft of the proposed statute, printed and bound together with this "explanatory note," was formally approved by the conference, and it directed that the same

be submitted and recommended to the legislatures of the different states for enactment.

The National Conference, at the same session, also approved the report of the Committee on Commercial Law, which contains the following:

> "The committee is of opinion that the act as drafted preserves all the commercial advantages of the present Limited Partnership Acts and does away with the very serious disadvantages which arise from regarding a person who has contributed to the capital of the partnership as a partner to be held unlimitedly liable for all partnership debts, unless he has strictly complied with the requirements of the statute."

Pursuant to the direction of the conference, the secretary of the Illinois Commissioners, caused the proposed statute and the "explanatory note" to be printed and bound together. In this form he placed them at the disposal of the members of the Illinois House and Senate.

The statute was accordingly enacted in the form recommended, and became effective on July 1, 1917, as the law of Illinois.

Just before and just after this, the same statute and the same explanatory note were similarly presented in many other states, and the statute accordingly adopted and enacted into law in the years 1917, 1918 and 1919, by Alaska, Pennsylvania, Maryland, Idaho, Minnesota, New Jersey, Tennessee, Utah, Virginia and Wisconsin. It is now similarly pending before the state legislatures in many other states.

Theory of Uniform Limited Partnership Act.

Because these statutes, to be useful, must be *uniform*, the many new statutes, proposed by the National Conference on various subjects, are invariably submitted to

legislatures in this form, with an "explanatory note" approved by the National Conference, so that from and after the enactment, each adopting state will have a local law *in text and in principle,* exactly like each other adopting state.

In 1918 Prof. William Draper Lewis, who prepared this act, published an article concerning the "Uniform Limited Partnership Act." This article appears in the Pennsylvania Law Review, Vol. 65, p. 715. It is published verbatim in the appendix to this brief, p. xxvii.

In the "explanatory note" it is succinctly pointed out, and in Dean Lewis' article it is more elaborately pointed out, that the vehicle known as the limited partnership, which had general partners who were liable for all debts, and limited partners whose liability was limited, was a legal device which was imported originally from the French law.

Under the French law, a limited partner did not, through inadvertence, become a general partner or have the liability of a general partner.

The first of these old statutes was adopted in New York, and the Illinois 1874 Act, and that of most other states, was practically a copy of the New York statute.

By the terms of some of these old statutes, and by the construction placed by New York and other courts upon them, there grew up in this country the rule of holding those to be general partners who attempted to be limited partners, but who failed, by reason of technicality, or inadvertence, to meet exactly the statutory requirements. The establishment of this rule destroyed the usefulness of the old limited partnership statutes, because business men generally deemed that form of association to be too dangerous, because of the great risk of limited partners being held general partners.

The report proceeds to point out that no sound public policy requires that one who attempts to be a limited partner, and who holds himself out *only* as such, and who does not deceive the public or creditors, should be held a general partner because of some technical defect, and that, therefore, one of the cardinal principles on which the new uniform act was builded was to depart absolutely from these old rules, and to establish a new *public policy* in the states which adopt the new act.

It was pointed out that, when the new statute became the law, one who had, in good faith, attempted to limit his liability, but had failed to do so should not be considered a general partner, and it was stated that Section 11 was specifically written into the new statute for the express purpose of remedying the existing evil, and bringing about the new condition.

It should be noted that this new public policy was expressed in the broadest terms to exempt from liability as general partners those who, in good faith, had attempted to become limited partners. The language of Section 11 (in conformity with the policy which it crystalized into law) *is not in any way limited.* The basis of its broad exemption is that of "erroneous belief," without limitation or reservation. The "erroneous belief" is not limited to error of law, or of fact. If the "belief" exists and is erroneous, the party can exempt himself by the statutory method. If he complies with that method, he will not be held to the liability of a general partner. This statute, even without its context and avowed intention, *covers this case completely.*

To make this more certain, the new statute contains Section 28, which reads in part:

> The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it." (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 72.)

Uniform Act Expressed a New Public Policy.

The legislature of Illinois adopted this new public policy as the law of Illinois. It specifically repealed the existing statute *and, in effect, it overthrew the old rule, announced by the existing judicial decisions based on such previous statute.*

On July 2, 1917, in Illinois, the old statute had been specifically repealed, and a new public policy had been instituted in its place, and was then in effect. (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 75, p. 2413.)

At this point attention may be directed to the fact that the *purpose* of this act was to make a new public policy, not for *one* state alone, but for *all* adopting states, embodying new fundamentals, concerning the liability of a limited partner, and to protect him from being held to be a general partner.

This public policy was not an outgrowth of Illinois law, or a change merely in Illinois policy, but was the deliberate adoption by Illinois, together with a number of sister states, of a *new and uniform* basic principle.

In every state where this statute was presented to the legislature, it was accompanied by the "explanatory note" of those who drafted it, showing the reasons for its enactment. This same practice as to an "explanatory note" is followed as to all "uniform statutes" on various subjects, which are presented by the National Conference, and proposed by it to be written into the laws of the various states. A considerable number of these uniform statutes have been adopted in Illinois.

Obviously, this method of procuring the enactment of uniform laws gives such acts a wholly different character from the ordinary enactment of a local statute. It has been so recognized by this court.

> *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Company,* 239 U. S. 520, 526, 528, 529.

That case, which came to the court on appeal, involved the Uniform Negotiable Warehouse Receipts Act of Louisiana. This was one of the uniform acts which was procured by the National Conference to be enacted in many states. The construction of the act was sharply disputed, and the court, in construing the act, *quoted* (p. 526) *from the report of the commissioners, and adopted the reasoning and the language of that report.*

It was strongly urged in that case that the Louisiana court rulings, establishing rules of law for Louisiana, as they stood *before* the enactment of the uniform law, should be followed in the construction of the new act.

This court, however, refused to hold this, and pointed out that these *uniform statutes* were not based on local laws, but were, in effect, the adoption of *a new code of principles* applicable alike in all the states adopting the act. The court said (at pp. 528-9):

> "It is said that under the law of Louisiana, as it stood prior to the enactment of the Uniform Warehouse Receipts Act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank. (*Stern Bros.* v. *Germania National Bank,* 34 La. Ann. 1119; *Lalande* v. *His Creditors,* 42 La. Ann. 705; *Holton* v. *Hubbard,* 49 La. Ann. 715; *Insurance Co.* v. *Kiger,* 103 U. S. 352; *but see Hardie* v. *Vicksburg S. & P. Ry. supra,* 118 La. 254); and it is urged that the new statute is but a step in the development of the law and that decisions under the former state statutes are safe guides to its construction. We do not find it necessary to review

these decisions. It is apparent that if these Uniform Acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (Sec. 57): 'This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.' This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the states dealing with such documents, but there still remained diversity of legal rights, under similar commercial transactions. *We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it;* and, in this view, we deem it to be clear that in the circumstances disclosed the Commercial Bank took title to the warehouse receipts and to the cotton in question."

In view of this high authority it seems settled that (1) in construing this act as one of the Uniform Acts, its *real purpose* supersedes and repeals existing local statutes, as well as existing court decisions which are in conflict with its real purpose; and that (2) in ascertaining such *real purpose* the explanatory report of those who drafted the statute is to have great, if not controlling, weight.

Decisions Under Old Acts Have no Application.

The courts may not take from the decisions construing the old limited partnership acts a rule to be applied in determining rights and liabilities under the Uniform Act.

For this reason cases cited by the petitioners (*e. g.*, *Henkel* v. *Heyman*, 91 Ill. 96; *Manhattan Brass Co.* v. *Allin*, 35 Ill. App. 336; *Walker* v. *Wood*, 69 Ill. App. 542; *Buckley* v. *Lord*, 24 How. Pra. 455, etc.), have no application to this situation. These cases are apt examples of the very evil which the Uniform Act was designed to remedy.

The principle announced by this court in *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank and Trust Company* (*supra*), was recognized in a recent decision of the Supreme Court of Illinois in the case of *City Bank* v. *Bank of Republic*, 300 Ill. 103, which involved the construction of the Uniform Negotiable Instruments Act. The court said (pp. 106, 107):

> "The law was enacted for the purpose of furnishing in itself a certain guide for the determination of all questions covered thereby relating to commercial paper, and so far as it speaks without ambiguity as to any such question reference to case law as it existed prior to the enactment is more likely to be misleading than beneficial. If the provisions of the act harmonize with the general principles of commercial law in force before its enactment, those principles should be followed. But if the language of the act conflicts with statutes or decisions in force before its enactment, the courts should not give the act a strained construction in order to make it harmonize with earlier statutes or decisions. If this is done the very purpose of the act is defeated; in order to keep the law as nearly as may be uniform the courts of all the states should keep in mind the spirit and object of the law and should give to the language of the act a natural and common construction, so that all might be more likely to come to the same conclusion."

CONTENTIONS OF PETITIONERS WITH RESPECT TO SECTION 11.

Petitioners in denying the right of Hecht and Finn to rely upon Section 11 of the Uniform Limited Partnership Act contend:

1. That it applies solely to limited partnerships formed under said act.
2. That it is inoperative because Exhibit A contemplated a firm which was to engage in the brokerage business.

In urging these contentions petitioners have found it necessary to read into Section 11 language which the legislature did not use, and did not intend to use. The meaning of the section is clear and unmistakable. It matters not whether Marcuse & Co. was attempted to be organized under the Act of 1874, or under the Uniform Act of 1917. Section 11 was intended to, and does, afford protection to a person who has contributed capital to a firm and who honestly (though erroneously), *believed* that he became a limited partner in a limited partnership. It was not (as contended by petitioners) incorporated into the act for the benefit of persons who are actually members of a limited partnership organized under said act. Its application is not confined to those who have substantially complied with Sections 1 and 2 of the act. The whole act protects such persons. Such persons *are* limited partners and are liable only as such.

Section 11 covers attempts, and under any act—not those which have succeeded, but those which have failed. Section 11 protects a person who erroneously believes *what is not the fact, i. e.,* that he is a limited partner in a limited partnership. The *question* is, did Hecht and Finn contribute to the capital of Marcuse & Co., *"erroneously believing"* that they had become limited partners in a limited partnership?

The ground for relief as distinctly stated in the statute is the fact that the contribution has been made under an erroneous belief. The existence of the erroneous belief is the thing which brings Section 11 into operation. *If the erroneous belief exists, Section* 11 *applies.*

There is no justification for reading into the statute language which restricts and limits its operation, and which completely defeats its remedial purpose.

The whole theory and policy of the Uniform Limited Partnership Act differs from that of previously existing acts. Under those acts all persons seeking to form a limited partnership were regarded as general partners unless they had fully complied with the requirements of the statute. The theory of the uniform act is not that every failure to comply with the statute makes the parties general partners, or that all parties are in the first instance general partners; but that no person who has contributed to the capital of a firm and who erroneously believes that he is a limited partner in that firm shall be held liable as a general partner unless he learns the contrary and fails to promptly avail himself of the remedial provisions of the act. *Then, and not until then, does such person become liable as a general partner.* This is a fundamental conception which underlies the whole act.

There is no provision in the Act of 1874 against the conduct of a brokerage business by a limited partnership. Even though Hecht and Finn attempted to comply with that act and failed, petitioners' contention with respect to the brokerage business is of no avail. As we have seen, the language of Section 11 of the Uniform Act is not limited to attempts under any particular act, but its broad remedial provisions fully cover all attempts which, by reason of some error or oversight, are

not carried into effect. Moreover, there is nothing in the Uniform Act which deprives a supposed limited partner of the benefits of Section 11, because his firm engages in the brokerage business. With respect to the brokerage question, petitioners have again attempted to modify the clear language of Section 11 and to create an exception which does not exist.

Status of Limited Partnership Determined by New Act.

Petitioners seem to contend that because the parties did not know of the repeal of the Act of 1874, and of the new Act of 1917 and were not attempting to organize a limited partnership under the Act of 1917 the provisions of the Act of 1917 have no application.

Suppose that while the parties to Exhibit A thought they were proceeding under the Act of 1874, they did nevertheless comply with the requirements of the Act of 1917, would anyone doubt that the limited partnership would be a legal and valid limited partnership under the Act of 1917?

When the final step was taken, *i. e.*, the filing of the limited partnership certificate, the Act of 1917 was in force. The fact that the parties may have had in mind the Act of 1874 would not have rendered ineffectual the firm they were organizing, if in fact the things they did had been a compliance with the Act of 1917.

When the limited partnership certificate was filed on July 2, 1917, the parties to Exhibit A *were attempting to organize a limited partnership.* The reason why it is contended that a limited partnership was not legally organized was not because what was done was not a compliance with the Act of 1874, but because it was not

a compliance with the Act of 1917 which was the law of Illinois on that date.

In order to establish that on July 2, 1917, a limited partnership could not be organized in Illinois to carry on a brokerage business, the Limited Partnership Act of 1917 must be applied to the situation, *but that act cannot be applied for the purpose of establishing that no limited partnership was legally organized and at the same time the application of the act be denied for the purpose of depriving the parties of the beneficial provisions of the act.*

As already stated, in their effort to establish that Section 11 of the Uniform Limited Partnership Act does not apply, petitioners insist that Section 11 was intended to apply only to limited partnerships formed under the Uniform Partnership Act of 1917.

They call attention first to the fact that Section 1 of the 1917 act defines a limited partnership.

They call attention to Section 30 which provides that a limited partnership "formed under any statute of this state prior to the adoption of this act" may become a limited partnership under the 1917 act in the manner therein pointed out.

They point to Subsection 2 of Section 30 which provides that "a limited partnership formed under any statute of this state prior to the adoption" of the 1917 act, until or unless it becomes a limited partnership under the 1917 act, shall continue to be governed by the provisions of the 1874 act and they point to Section 31 which provides that except as affecting "existing limited partnerships" to the extent set forth in Section 30 the Act of 1874 was repealed.

At the time the Act of 1917 became effective Marcuse & Co. was not a limited partnership "formed under

any statute of this state prior to the adoption" of the 1917 act. The attempted limited partnership in so far as it had progressed prior to July 1, 1917, was in *process* of organization. Petitioners have pointed out that Section 8 of the Act of 1874 provided that no limited partnership should be deemed to have been formed until the limited partnership certificate and the required affidavit had been properly filed. This had not been done, hence, it is contended the then contemplated limited partnership on July 1, 1917, was not a limited partnership formed under any statute prior to the adoption of the 1917 Act.

Section 30 of the Act of 1917 was not intended to apply to a contemplated limited partnership only in process of organization, but to a legally organized limited partnership and, therefore, under Section 31 of the Act of 1917, which by its very terms applies only to "existing limited partnerships," the Act of 1874 was not continued in force as to Marcuse & Co. for the reason that when the Act of 1917 became effective Marcuse & Co. was not an existing limited partnership.

In fact the Act of 1874 may be and properly should be put out of consideration in this case. All of the discussion by petitioners as to the provisions of the Act of 1874 and the effect of them may be put aside by the court. When the limited partnership certificate was filed there was no Act of 1874 so far as Marcuse & Co. was concerned. That act had been repealed except only as to existing partnerships legally organized under some prior act, therefore, the legality of the limited partnership known as Marcuse & Co. must be tested by the provisions of the Act of 1917.

There is nothing in the Act of 1917 to warrant the belief that the legislature intended that Section 11 should have no application to a case where the final step

in the process of organization was taken when the Act of 1917 was in force simply because the organization had been begun and steps in the process of organization had been taken before the Act of 1917 became effective. Petitioners, as well as Judge Evans, in his dissenting opinion in the Court of Appeals, have misconstrued the provisions and misconceived the effect of the Act of 1917.

Tender and Payment Were Not Necessary.

For the first time in this case petitioners in this court urge the contention that the amount thus tendered and paid into court was not sufficient. No such contention was raised on the trial in the District Court, but the testimony of the witness Finn (Rec., 654, 655) was undisputed. No such contention was raised in the Court of Appeals. This clearly appears from the opinion of that court in which it is said, referring to Section 11 (Rec., 743) that

> "it is not contended that the unconditional payment of the $46,000 falls short of compliance with the section if the section has application."

Petitioners cannot make this contention for the first time in this court. Failure to raise this point before was a waiver of it.

But, aside from this there is no merit in the contention. Regensteiner and the Studebakers were creditors of the firm of Von Frantzius & Co. and were among the individuals to whom Marcuse issued trust certificates when he finally succeeded in taking over the assets of that company. Under the terms of Exhibit A, 25 per cent of the net profits of Marcuse & Co. was to be paid to Marcuse until all profits received by him exclusive of salary and interest should be sufficient to pay the trust certificates issued by him to the creditors of

Von Frantzius & Co. A portion of the profits of Marcuse & Co. accruing to him, were to be used to pay off the creditors of Von Frantzius & Co. to whom Marcuse had issued such trust certificates. These trust certificates evidenced his individual plan and undertaking. No question was raised in the trial court as to whether or not any payments were made to these creditors of Von Frantzius & Co. and there was no evidence on the point. In fact no payments were made to the holders of Von Frantzius certificates out of dividends of Marcuse & Co. There is no foundation in fact for petitioner's argument and, in making it, they entirely overlook the distinction between creditors of the firm of Von Frantzius & Co. and limited partners under Exhibit A. The position of Hecht and Finn as creditors of Von Frantzius & Co. and their position as limited partners are two very different positions, and so too as to a creditor of Von Frantzius & Co. who might also be a certificate holder under Exhibit B. Section 11 has no application to creditors as such of Von Frantzius & Co. Vette and Zuncker were not even creditors of that firm. (Rec., 473.)

The various motives which may have induced Vette, Zuncker, Regensteiner and Studebaker Bros. Trust to purchase trust certificates, are wholly immaterial. In the case of *Burnett* v. *Snyder*, 81 N. Y. 550, 557, 37 Am. Rep. 527, 532, the court said:

> "The motive which induced Snyder, by indirection, to become interested in the business of Strang, Platt & Co., so long as the arrangement made did not operate as a fraud upon the creditors of the firm, is not a material circumstance."

Section 11 has no relationship to anything a limited partner might have been paid as a creditor of the partnership and certainly it has no relationship to anything which he may have been paid as a creditor of some other partnership, *i. e.,* Von Frantzius & Co.

Moreover, inasmuch as there had been no decisions passing upon the point counsel for Hecht and Finn no doubt pursued the wiser course in tendering the $46,000 and paying it over to the clerk of the court, but we respectfully urge that no such tender and payment was necessary under the provisions of Section 11. Section 11 says nothing about the repayment of any money. That section provides that upon ascertaining the mistake one who erroneously believes that he has become a limited partner may, on ascertaining the mistake, promptly renounce *his interest in the profits of the business or other compensation by way of income.* What is meant by "his interest in the profits of the business or other compensation by way of income"? Manifestly, it refers to his interest in or right to receive profits or other compensation not paid over. Profits which have already been paid to him or compensation which he has already received belong to him. Such profits or compensation are no longer connected with the business. Where one occupies a position with reference to a business which gives him an interest in unpaid profits which may be paid in future or a right to receive compensation, it is proper and appropriate to speak of his renouncing his interest in such profits or compensation, but if the legislature intended that such an individual must restore to the business the profits or compensation which he had already received it would be wholly inappropriate to say that he must renounce such profits or compensation. The word "renounce" would be wholly out of place in such a situation. What the statute would say is that he must repay or return such profits or compensation.

In the University of Pennsylvania Law Review of January, 1923, Volume 71, page 150, appears an interesting article on "The Nature of Limited Liability under the Uniform Limited Partnership Act," which

is reprinted in the appendix to this brief, page xlvi. It is really a discussion of this case as decided by the Court of Appeals and among other things it is pointed that no such tender and payment was necessary under the provisions of Section 11.

Position of These Respondents as to Tender and Renunciation.

Comment is made upon the fact that these respondents took no part in the renunciation and tender of $46,000 by Hecht and Finn under Section 11 of the Uniform Act of 1917. Hecht and Finn signed Exhibit A believing that they thereby became limited partners in Marcuse & Co. Their execution of that contract demonstrates that belief.

Vette, Zuncker and Regensteiner did not believe that by purchasing trust certificates they became partners, either limited or general, in any firm. They had no such intention. Exhibit B is ample proof of this. The same is true of Hoffman, and, of course, neither of the Studebakers had any such belief or intention.

We have contended and still contend that, even if Hecht and Finn are held to be general partners, these respondents cannot be so held. However, it is clear that these respondents cannot be held to such liability if Hecht and Finn are not liable. A holding in favor of Hecht and Finn disposes of the partnership question as to these respondents as well. We have a right to demonstrate, if we can, that Hecht and Finn are not liable. Hecht and Finn may be held not liable by reason of their compliance with the partnership statutes of Illinois, or by reason of their compliance with Section 11 of the Uniform Act of 1917. In any event the result is the same, *i. e.*, these respondents are not liable as general partners.

Petitioners argue that Hecht and Finn had no authority to tender and renounce for any of the certificate holders; that the other certificate holders refused to give them any such authority and that the Court of Appeals erroneously held that all of the certificate holders were entitled to the benefit of the tender and renunciation made by Hecht and Finn.

Vette, Zuncker and Regensteiner must be connected with the partnership, if at all, through Exhibit B. The Studebakers must be connected, if at all, through the Studebaker Bros. Trust instrument and through Exhibit B. If Hecht and Finn may be said to have represented the certificate holders it was under and within the provisions of Exhibit B and, as the Court of Appeals well suggested, it would be unconscionable to attempt to charge the certificate holders with responsibility on the theory that Hecht and Finn represented them in this partnership for the purpose of fastening upon them the liability of general partners and then deny them the benefit of what Hecht and Finn did toward protecting them against any such liability. (Rec., 743, 744.) In support of their contention that these respondents refused to authorize Hecht and Finn to tender and renounce for them, petitioners refer to testimony given by Mr. Platt.

The court should have in mind that while Mr. Platt very strenuously insisted that neither Hecht, Finn, Vette, Zuncker, Regensteiner or the two Studebakers, or any of them, are liable as general partners, he argued that if, however, Hecht and Finn should be held to be liable the others should be likewise held. This was his position in the trial court.

The court will find his testimony on Rec., 658-661. If one will read his cross-examination it will not be

difficult to clearly understand the position which Mr. Miller and Mr. Donald Defrees took in the conference to which Mr. Platt invited them.

Hecht and Finn were the trustees under Exhibit B. Mr. Platt's firm then represented both of them. He was preparing a draft of the written tender and renunciation. He had inserted a phrase in the instrument to the effect that Hecht and Finn were making tender by authority of the beneficiaries under the trust. The matter had not been submitted to the beneficiaries under the trust and the statement was inaccurate except as that authority grew out of the relationship of Hecht and Finn as trustees of the Hecht-Finn Trust, and Mr. Miller suggested to Mr. Platt, and the suggestion was concurred in by Mr. Defrees, that if the trustees made the statement they would have to make it on their own responsibility and that Mr. Platt, as counsel for Hecht and Finn, would have to assume the responsibility of deciding whether these trustees should make the tender on their own behalf or whether it was their duty as trustees to make the tender not only on their own behalf as limited partners, but on behalf of all the certificate holders.

Hecht and Finn made the tender and renunciation "acting on behalf of themselves and each acting for himself individually and also acting as Trustees under a Trust Agreement, a copy of which is deposited with the Chicago Title & Trust Company of Chicago, Illinois, and on behalf of all beneficiaries under said trust agreement," etc. (Rec., 654, 655, 58, 59), which, of course, was the thing for them to do.

The partnership acts are not to be strictly construed. They are to be liberally construed. Section 28 of the Limited Partnership Act provides that the rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(Hurd's Rev. Stat. of Ill. Ch. 106a, 1921, Sec. 72. See this brief, pp. 34, 35.) A court is to give attention to the conscience of a situation. Justice and equity are to play a part in the decisions of the courts. The $190,000 of limited partnership money went into the capital of this business and every dollar of profits paid out on account of this limited partnership contribution to the capital of the firm with interest thereon and more went into the hands of the clerk of the court for the benefit of the estate and, as the Court of Appeals said in referring to the respondents:

> "Their connection with the partnership being thus traced through their representation by Hecht and Finn, it follows that if such representation would operate to charge them, they should in good conscience also have the benefit of whatever Hecht and Finn may have done which would bring relief from the charge." (Rec., 743.)

This holding is in keeping with the spirit of the statute and with the conscience of the case.

Belief of Hecht and Finn.

There can be no serious question but Hecht and Finn erroneously believed they were becoming members of a limited partnership.

This Court of Appeals stated in its opinion (Rec., 740):

> "It is apparent that none of the parties to the contract, or the certificate holders under the Hecht-Finn Trust contemplated or supposed that general partnership liability was assumed by any of them except Marcuse and Morris; and it was the evident understanding and belief of all that the others, whether called special partners or certificate holders, would have no liability beyond their investment, and no participation in the conduct and control of the business, which was by the agreement committed wholly to Marcuse and Morris."

This statement by the Court of Appeals was not only justified, but required by the evidence in the record. It was never in the mind of anyone that any of the parties other than Marcuse and Morris should be general partners. Marcuse did not attempt to organize any partnership other than a limited partnership.

In the conversation which Marcuse had with Clement Studebaker, Jr., in Boston prior to April 2, 1917, he told Clement Studebaker, Jr., that he wanted him to become a *special* partner in the firm that he would form and that he would require at least $200,000 to be made up of "*special* partnership" money (Rec., 443, 444, 502.) This conversation as indicated took place prior to the execution of the limited partnership documents on April 2, 1917, which were left in escrow.

Marcuse testified that he told Zuncker that Hoffman would become a special partner representing Clement and George Studebaker. (Rec., 449.) This was prior to April 2, 1917.

It was a limited partnership that Marcuse was trying to organize. These references to the record are sufficient to show this. There is nothing to the contrary.

The documents, nine copies of which were signed on April 2, 1917, and left in escrow with Col. Foreman, were designed, if they ever became effective, to organize a limited partnership. (Rec., 228-234, 269-318.) If these documents had become effective, Marcuse and Morris would have been the only general partners. All of the other signers would have been limited or special partners. No one disputes this. When this contemplated limited partnership was abandoned because the New York Stock Exchange objected to a limited partnership with more than two limited partners, etc., Marcuse did not start out to organize a general partnership but he

started out to organize a limited partnership consisting of himself and Morris as general partners and of only two limited partners. Marcuse was asked how it came about that Hecht and Finn became the special partners (Rec., 464) and he testified (Rec., 465) that he asked them whether they would be willing and that they consented, and (Rec., 500) he testified that he was the one who solicited and procured the consent of Hecht and Finn to act as special partners with himself and Morris as the general partners.

May 8, 1917, was the date of the telegram from the Secretary of the New York Stock Exchange to Marcuse, advising him that the committee on admissions probably would have no objections to a firm having two special partners if they were not engaged in any other business and were otherwise passed upon favorably by said committee. (Rec., 262.)

Finn testified that there came a time after May 8, 1917, when some one took up with him the plan of organizing a partnership which would contemplate only two limited partners and his becoming one of them, and he stated that undoubtedly Mr. Sidney Stein (now dead) took up the matter with him. He testified also that Mr. Stein was the one who persuaded him to go into that "limited partnership contract" which contemplated Hecht and himself as limited partners. (Rec., 328.)

After the abandonment of the limited partnership contemplated by the documents left in escrow with Col. Foreman and after Marcuse and Sidney Stein started out to organize the partnership which finally resulted in the limited partnership agreement, Exhibit A, Marcuse and Sidney Stein in a conversation with Buckingham told Buckingham that there could only be two special partners and Stein told Buckingham that they

would like to have Hoffman or somebody else representing the Studebaker interests to be a special partner in the firm that he proposed to organize. (Rec., 5 2, 553.) These references serve to demonstrate that after the abandonment of the plan which contemplated more than two limited or special partners, the thing that Sidney Stein and Marcuse started out to do, was to organize a limited partnership with but two limited partners. The record does not contain a suggestion to the contrary. No one contemplated for a moment any arrangement under which any one but Marcuse and Morris would be general partners. Exhibit A is a limited partnership agreement. Under it Hecht and Finn were to be limited partners only. Exhibit B recognizes Exhibit A as a limited partnership agreement and that Hecht and Finn were to be limited partners. The certificate filed with the county clerk shows Hecht and Finn to be limited partners. (Rec., 242.) The stationery used by Marcuse & Co. in the conduct of the business of that firm showed Hecht and Finn as limited partners. (Rec., 527, 528.) The same thing is true of the firm's business cards. (Rec., 527, 528.)

Every step that was taken and every document issued was in furtherance of a purpose and intention and evidenced a belief that Marcuse and Morris would be the only general partners and that Hecht and Finn would be only limited partners. The certificate holders other than Hecht and Finn were to be neither general nor limited partners.

A state of mind such as belief may be proven

1. By circumstances which would naturally have brought about such belief.

2. By the conduct of a person indicating such belief.

Greenleaf on Evidence (16th Ed.), Vol. I, p. 67.
Wigmore on Evidence, 1st Ed. Vol. I, p. 303.

Indeed the strongest kind of evidence of a man's belief is such evidence as we have been calling to the court's attention, *i. e.*, discussions in the endeavor to organize a limited partnership; efforts to persuade men to become limited partners, documents consistent with and evidencing an intention to organize a limited partnership, etc. That the partnership was intended to be a limited partnership no man can seriously question, and it follows from these considerations that Hecht and Finn believed that they were becoming limited partners only. *It would be absurd to suggest that these men intended to become limited partners only and endeavored in good faith to see to it that the documents they were executing made them limited partners only and yet executed the documents and went into the arrangement in the belief that they were nevertheless becoming general partners.*

Nor can it be said that they may have subsequently changed their minds about this.

The law's presumption is that they continued of the same mind; and there is no evidence which has any tendency to show that they ever changed their minds.

Hundreds of authorities might be cited for the elementary proposition that a fact or a set of facts once proved are presumed to continue until the contrary is established by proof.

In Greenleaf on Evidence (16th Ed.), Volume 1, page 140, the author states that:

> "The opinions, also, of individuals once entertained and expressed, and the state of mind, once proved to exist, are presumed to remain unchanged until the contrary appears."

A presumption of continuance has been frequently

recognized by the courts in the case of intention, purpose or design.

Leport v. *Todd,* 32 N. J. Law, 124, 129, 131.
Cook v. *Moore,* 65 Mass. (11 Cush.) 213, 216. 217.
Larsen v. *Postal-Tel.-Cable Co.* 150 Iowa, 748; 130 N. W. 813, 815.
Barker v. *Western Union Tel. Co.* 134 Wis. 147; 114 N. W. 439, 440, 441; 126 Am. St. Rep. 1017; 14 L. R. A. (N. S.), 533.
Ruling Case Law, Vol. 10, p. 872.

It is held that mental condition once shown to exist is presumed to continue until the contrary is shown.

Todd v. *Todd,* 221 Ill. 410, 413, 414.

In the case of *Leport* v. *Todd,* 32 N. J. L. 124, an intention once proved was presumed to continue in existence for nearly 20 years.

Erroneous belief is not limited to mistakes of fact. A man who believes he is a limited partner may not be because of facts or of law or both. If he believes he is when he is not he has an erroneous belief. Section 11 cannot be limited as petitioners would limit its provisions.

Nor could it be successfully contended that Hecht and Finn could not renounce their interest in the profits, etc., of Marcuse & Co. when they did.

The relief by way of renunciation afforded under Section 11 is not limited to members of prosperous firms,—to those which are definitely assured of future profits? (And what business is?) There is nothing in the language of the statute to support such a contention. It is not so limited. Hecht and Finn brought themselves squarely under Section 11 by their prompt renunciation

and their tender of $46,000 to the receiver, upon learning of the claim that they were general partners in Marcuse & Co. (Rec., 654, 655), and by their payment of that sum in open court (Rec., 70), it being an amount in excess of all of the profits and income which they had received as special partners of the firm of Marcuse & Co. (Rec., 655.)

It was the clear intent and purpose of Section 11 that anyone who had attempted in good faith to become a limited partner in a limited partnership and who believed himself to be such limited partner might by compliance with Section 11 relieve himself of the formerly existing danger of being made a general partner against his agreement and merely by operation of law.

Accordingly, the Circuit Court of Appeals held that by reason of the provisions of Section 11 and the renunciation and payment by Hecht and Finn none of respondents are liable as general partners.

Alleged Falsity of Limited Partnership Certificate.

Petitioners charge in their brief (page 49) that the limited partnership certificate filed July 2, 1917, was false in two particulars:

(a) The names of the limited partners were not all disclosed, and

(b) The amount of the contribution of each limited partner was not correctly disclosed.

Section 4 of the Act of 1874 provides that persons desirous of forming a limited partnership shall make and severally sign a certificate which shall contain, among other things, the names of the general and special partners therein distinguishing which are general and which

are special partners and their respective places of residence and the amount of capital stock which each special partner shall have contributed to the common stock.*

Petitioners, therefore, rely upon a provision of the Act of 1874 to establish that the limited partnership certificate was false, although that act was no longer in force when the final act of organization, *i. e.*, the filing of the limited partnership certificate, took place.

But, even tested by Section 4 of the 1874 act, the certificate is not subject to the attack aimed at it.

First, this certificate is signed by Marcuse, Morris, Hecht and Finn. (Rec., 242.) It gives the addresses of each of these four parties and designates Marcuse and Morris as general partners and Hecht and Finn as limited partners.

Neither Vette, Zuncker, Regensteiner or the Studebakers signed this certificate or had anything to do with it. They are not mentioned in it. They were not parties to Exhibit A. They did not become and had no intention of becoming members of the firm of Marcuse & Co., either general or limited. On the contrary Vette, Zuncker and Regensteiner intended to become only certificate holders under Exhibit B and the Studebakers did not even intend to become certificate holders.

None of these respondents signed the certificate and none of them were named in the certificate as limited partners because none of them were limited partners.

The certificate states the amount of Hecht's and Finn's contributions to the firm as $95,000 each. (Rec., 242.) The attached affidavit (Rec., 243) was by Mar-

*Section 4 of Limited Partnership Act of 1874 is set forth in petitioner's brief, p. 4.

cuse. In this he states that he was one of the general partners and that the amount of money specified in the certificate to have been contributed by each of the special partners, the aggregate being $190,000, had been contributed, etc. This was true.

Zuncker paid for the certificate issued to him under Exhibit B with a check payable to Hecht and Finn who were trustees under Exhibit B. The same is true as to Vette and Regensteiner. Hoffman paid for the certificate purchased by Studebaker Bros. Trust with a check payable to his own order and by him endorsed to Hecht and Finn. As heretofore stated Hecht and Finn could have deposited these checks in bank and drawn their own checks payable to Marcuse & Co. for the full amount of $95,000 each, or they could, as they did, endorse these checks payable to the order of Marcuse & Co. and delivered them, together with their own checks for the balance of $190,000 for the certificates which they received under Exhibit B, to Marcuse & Co. The manner in which Hecht and Finn handled this was an inconsequential detail.

It was a matter of no consequence to Marcuse & Co. or to any subsequent creditor in what manner Hecht and Finn raised the $95,000 which each was to contribute to the capital of that firm. The substance of the thing was that under Exhibit A they agreed to contribute $95,000 and each of them did contribute that amount. They could have made that contribution out of money they had on hand in their own bank accounts or they could have borrowed the money or it could have been raised under Exhibit B, etc. The law was concerned only with the fact that the amount agreed to be contributed by the limited partners was contributed. Future creditors of Marcuse & Co. could have no

other concern. The important fact was that $190,000 of limited partners' money was to go into the business and that amount did go into the business. It was an actual contribution. Marcuse & Co. received that amount of money.

Crehan v. *Megargel*, 234 N. Y. 67,* is conclusive against petitioners' contention. In this case the limited partner procured money through a trust arrangement substantially like Exhibit B and put that money into the partnership. The case, as decided by the Supreme Court, Appellate Division, First Department, in January, 1922, appears in 192 N. Y. S. 290. Section 34 of the Partnership Act dealing with limited partners provided that if any false statement be made in any such certificate or affidavit made either upon the formation or renewal or continuance or increase of capital of such partnership, the persons interested therein should all be liable as general partners. (192 N. Y. S. 295.) It was claimed that the certificate was false in that Megargel named therein as special partner and as having contributed a stated amount of money was not the person by or for whose benefit the money was actually and in good faith contributed.

The Court of Appeals said, referring to a creditor (234 N. Y. 80):

> "We fail to see how he is interested in the fact that the special partner has borrowed the capital which he contributes or has received it under some other form of arrangement even less compelling upon him than a loan, so long as the arrangement does not result in a violation or evasion of the statute and of the requirement that the special capital shall be contributed and that the special partner shall not assume the status of a general partner."

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*The opinion of the New York Court of Appeals in *Crehan* v. *Megargel* appears in the appendix to the brief of these respondents in opposition to certiorari, p. 26.

And the Appellate Division said (192 N. Y. S. 297):

> "All that the creditors are interested in so far as the special partner is concerned, is that the amount agreed to be contributed as special capital has in fact been paid in. It was a matter of absolute indifference to the creditors in what manner the special partner received his money so long as it was paid into the capital of the firm in accordance with the agreement."

The New York court held that the receipt holders under the trust instrument were not persons interested in the partnership within the meaning of the statute.

See, also, as bearing on this point, *Lawrence* v. *Merrifield*, 42 N. Y. Sup. Ct. 36, for an interesting opinion which was affirmed without opinion by the Court of Appeals in 73 N. Y. 590.

The fact that the attorneys for Vette, Zuncker, Regensteiner and Studebaker Brothers Trust met with Hecht and Finn at the office of Marcuse & Co. on Saturday morning June 30th when Exhibits A and B were executed and that the checks of Vette, Zuncker, Studebaker Brothers trust and the check of Regensteiner Colortype Company, with which Regensteiner paid for the number of shares he took under Exhibit B, were there delivered is a matter of no consequence. The fact cannot be denied that Hecht and Finn raised the $190,000 which they agreed to contribute to the special partnership, under and by means of the Hecht-Finn trust (Exhibit B). They contributed that amount of money to the capital of Marcuse & Co. as they agreed to do under Exhibit A. The statement in the certificate that Hecht contributed $95,000 and Finn a like amount was true. The statute in question did not concern itself with the source from which they procured the money.

But, as already pointed out, the section of the 1874

statute upon which petitioners ground their contention that the certificate was false was not in force on July 2nd, when the certificate was filed, and accordingly this section has no application.

BUCKLEY V. LORD.

Petitioners cite (Brief, p. 52) and rely on *Buckley* v. *Lord et al.* (sometimes referred to as *Buckley* v. *Bramhall* or *Bulkley* v. *Marks*, 24 How. Pr. 455 (15 Abb. Pr. 454). In the case of *Burnett* v. *Snyder*, 11 Jones & Spencer (N. Y.), 238, in which a subpartner was held not to be liable as a partner, this case was discussed and disregarded.

The opinion in the Buckley case is one of a court of inferior jurisdiction. No authorities are cited. It was decided in 1863, at a time when the courts still regarded themselves as bound by harsh technical rules in the construction of limited partnership statutes. The principles relied upon in that case have been overruled by later decisions of the New York courts.

In the Buckley case a limited partner was held to be liable as a general partner because he had made a false affidavit, and, a third person was held liable as a partner because he had participated in the business. The affidavit was held to be false because it recited that the limited partner had contributed $20,000 to the capital of the firm, whereas $8,000 of this money was contributed by the third party. Under later decisions of the New York courts, this affidavit would not be regarded as false.

> *Lawrence* v. *Merrifield*, 42 N. Y. Superior Court, 36, affirmed 73 N. Y. 590.

The language which the court used in criticizing the arrangement in the Buckley case was unnecessary and mere dictum. However, it should be noted that the reason that the third party did not wish to become a limited partner was that he desired to exercise the rights of a general partner. This circumstance alone clearly distinguishes that case from any element in the case before this court. Doubtless the court's criticism was aimed at this feature of the situation.

Buckley v. *Lord* received the comments of the New York Supreme Court, Appellate Division, First Department in *Crehan* v. *Megargel* (192 N. Y. S. 298), where that court said the court in the Buckley case did not hold Bramhall liable merely because a portion of the money contributed in the name of the special partner came from him, but because of his participation in the co-partnership through the guise of a special partnership designed to evade the law of limited partnership.

Respondents did not participate in any way in the conduct of the business of Marcuse & Co.

Under the title of Buckley v. Bramhall that case was also commented on by the Court of Appeals of New York in the Crehan-Megargel case, 234 N. Y. 67, 78, 79.

Under Uniform Act Only Person Injured Can Recover Because of False Statement.

Moreover, the Court of Appeals well pointed out in its opinion whatever may have been the rigors of the old Limited Partnership Act with the harsh construction placed upon it, an entirely different policy has been written into the law by the present Limited Partnership Act. *No longer is technical compliance required.*

Substance is now the thing. Innocent people are not to be penalized because an astute lawyer may be able to point out a technical inaccuracy in a certificate. Even where a false statement is made liability does not result as to all, but only as to those who executed the certificate knowing it to be false, and in favor of those only who suffer loss through reliance thereon. That is what Section 6 of the Limited Partnership Act plainly provides. (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 50.) In other words, if a false statement is made in a certificate one who suffers loss by reliance on such statement may hold *any party to the certificate* who knew the statement to be false at the time *he signed* the certificate or subsequently but within a sufficient time *before the statement was relied upon* to enable him to cancel or amend the certificate, etc. In other words, no one can be held to be liable except a party to the certificate and not then unless he knew the statement to be false at the time he signed the certificate or subsequently but within a sufficient time before the statement was relied upon to enable him to cancel or amend, etc., and no one can hold such an individual liable *except one who suffered by reliance on such false statement.*

One creditor might recover while another could not because one might suffer loss by reliance on such false statement while the other did not.

But such doctrine has no application to a bankruptcy proceeding because a bankruptcy proceeding is not for the benefit of one creditor, but of all creditors. For instance, in bankruptcy liability by estoppel has no application, but there must be an actual partnership, a liability *not because the party sought to be held liable has been held out to be a partner, but because he was a partner.* See this brief, pp. 74, 75.

And again, it is also to be borne in mind that the present Limited Partnership Act is to be liberally and not strictly construed. (Section 28, Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 72. See this brief, pp. 34, 35.

There is no merit in petitioners' contention even as applied to Hecht and Finn.

Contention as to False Statement Has no Application to These Respondents.

As to Vette, Zuncker, Regensteiner and the two Studebakers, and each of them, the contention as to a false certificate can have no possible application. None of them signed the certificate or had anything to do with it.

There is not a scintilla of evidence for a contention that anyone suffered any loss in reliance upon any of these respondents having any possible connection of any kind with Marcuse & Co. or to indicate that petitioners or any of the other creditors of Marcuse & Co. had any knowledge of Exhibit B or any of the certificates issued thereunder or that the Hecht-Finn Trust was in existence.

B.

IRRESPECTIVE OF SECTION 11, RESPONDENTS ARE NOT PARTNERS UNDER PROVISIONS OF UNIFORM GENERAL PARTNERSHIP ACT.

Persons Not Partners as to Each Other Are Not Partners as to Third Persons.

The Circuit Court of Appeals also held that wholly independent of Section 11, none of the Respondents are general partners as to creditors because they are not general partners as to each other.

A general partnership act, known as the "Uniform Partnership Act," was similarly enacted at the same time by the same Illinois Legislature, covering the relations of general partners. This act had exactly the same genesis and history as the other uniform acts above mentioned. This act also became the law in many other states and is one of the same chain of "Uniform Acts," which forms a wholly new code concerning general partnerships for the states adopting it. (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Secs. 1 to 44 inc.)

Among other things it provides:

> "4. (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

7. In determining whether a partnership exists these rules shall apply:

> (1) Except as provided by Section 16, *persons who are not partners as to each other are not partners as to third persons.*" (Section 16 deals with estoppel against one who holds himself out as a partner, and has no application here.)

This statute was in force on July 2, 1917, and has been in force since that time.

This is a general partnership act. It deals with the relations of general partners. The provision means

that persons who are not general partners as to each other are not general partners as to third parties as clearly as if the word "general" had been used in the section.

Hecht and Finn signed an agreement to be and become *limited partners* with Marcuse and Morris. They did not *agree* to become general partners. If they became *general* partners, it was because, and only because, their effort at limitation failed, and some rule of law *forced* on them the relation of general partners, against their will, and contrary to their express agreement and intention. What rules of law could have that effect? *None*, unless it was the 1874 statute. But that statute was not in force on July 2, 1917, and afterward. Then no law existed which would have such an effect. At that time and since, the new Illinois Code on partnerships prevailed, both as to *general* and as to *limited* partners, and under that code no one is a general partner as to third persons, unless he is also such partner as to his alleged partners. (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 7) (1) provided, of course, that he has not held himself out to creditors as a general partner. (Sec. 16, same act), and if he has done this, he may be held, not because he is such partner, but because he is estopped to deny that he is such partner, but as pointed out, this cannot be so in a bankruptcy proceeding. (Brief, pp. 34, 35.)

Excluding (as we must) the compulsion and force of the dead 1874 statute, are Hecht and Finn, *general partners* with Marcuse and Morris?

It is a cardinal principle of law that persons are not partners unless they *intend* to be such. Every partnership rests on the mutual consent of the members.

Ruling Case Law, Vol. 20, p. 831.

Phillips v. *Phillips*, 49 Ill. 437, 439.

Bushnell v. *Consolidated Ice Machinery Co.*, 138 Ill. 67, 74, 75.

Grinton v. *Strong*, 148 Ill. 587, 596.

Reed v. *Engel*, 237 Ill. 628, 631.

Goacher v. *Bates*, 280 Ill. 372, 376.

London Assurance Co. v. *Drennen, et al.*, 116 U. S. 461, 472.

Here Hecht and Finn never intended to be general partners and never consented to be such.

If Marcuse and Morris should now pay the firm debts, could they sue Hecht and Finn for contribution? Obviously, No! Because the four *solemnly agreed* that Hecht and Finn should not be liable for partnership debts beyond the $190,000 contributed by them.

It is another test of partnership that each partner is *agent* for all the others and binds them by his contracts within the scope of the partnership business. (See page 101 of this brief.)

Did Hecht and Finn agree that they would be bound by the transactions in stocks made by Marcuse and Morris beyond the contributions made by them to the firm?

On the contrary, in their agreement between themselves, Exhibit A, they *agreed* exactly the reverse.

In section numbered 2 of Exhibit A it is expressly agreed that

> "the liability of the said special partners shall be limited to the amount furnished by each of them towards the capital of the said firm and that they shall not be liable for any partnership debts or obligations beyond said amounts contributed by them respectively, *and that no provision hereof shall be construed to in any manner extend the said liability of the said special partners.*" (Rec., 20.)

Section 14, which refers to losses and expenses, manifestly means that losses and expenses are to be paid out of the earnings and capital of the business and that such losses are to be charged against the contributions of the partners, general and limited, to the capital of the firm in the proportions in which profits were to be distributed. This is made clear by the last sentence of Section 14 which reads:

> "It is hereby fully agreed and understood, however, that the liability of the said special partners shall be limited to the amount contributed by them respectively to the capital or capital stock of said firm." (Rec., 14.)

Petitioners state in their briefs (p. 75), that the limited partners agreed to share the losses, but this is true only to the extent of and not beyond the amount of their contributions to the capital of the firm. Of course, a limited partner places at the risk of the business the amount of his contribution to the capital of the firm and that is the extent of his commitment, and Exhibit A makes too plain for doubt that this was the extent of the commitment of Hecht and Finn.

We go a step further. The respondents, other than Hecht and Finn, did not sign Exhibit A. (Rec., 20, 25.) They did not *agree* to be limited partners with Marcuse and Morris, or any kind of partners. The 1874 act could not operate to force them from the position of limited partners to that of general partners, because they never agreed to be even limited partners.

On the contrary, Hecht and Finn (by Exhibit B) specifically agreed in terms that the certificate holders

> "shall have no right, title or interest, directory, proprietary or otherwise, in the said copartnership, or in or to the property or assets of said copartnership (of Marcuse & Co.) * * * nor shall

the holders of said trust certificates, by the acceptance thereof, be construed to have assumed any liability with respect to said trust, *or said copartnership.*" (Ex. B, Sec. 6; Rec., 29.)

Marcuse and Morris, in writing endorsed on Exhibit B, expressly consented that this should be the relation of the certificate holders. (Rec., 31, 32.)

The respondents, other than Hecht and Finn, never *agreed* to be partners of Marcuse and Morris, but Marcuse and Morris, as well as Hecht and Finn, agreed that they *should not be partners,* and should have no liability for said copartnership, or its acts.

Applying to this situation the Illinois statute, and the legal rules of determining, *inter se,* who are partners, could Marcuse and Morris now pay the firm debts and by virtue of Exhibit B enforce contribution from the original certificate holders, or from Gardner? or from Grollman? or from the grandchildren of George M. Studebaker?

Did the latter *intend* to be partners?

Did anyone, by acquiring a certificate under *Exhibit B* thereby constitute Marcuse and Morris his *agents* to buy and sell stocks, and bind him as principal of Marcuse and Morris?

And could any certificate holder likewise bind Marcuse and Morris? And if so, what certificate holder, and during what period? Was it while he owned the certificate, or after he sold it? When he sold it, did he continue a "partner," or did he thereby absolve himself from further liability and cease to be an agent? Did the new holder (Grollman) become a "partner" in Marcuse & Co.?

Applying these obvious tests, it is impossible to prop-

erly conclude that these respondents were "partners" of Marcuse & Co. or selected Hecht and Finn to operate the partnership. There is absolutely no evidence on which any such conclusion may be properly reached. Not one of these respondents, or any one representing any of them, ever "selected" Hecht or Finn to become their "agents," or to "operate the partnership." (Rec., 268, 327, 328.) On the contrary, the uncontradicted evidence of both Finn and Marcuse on this point shows exactly the converse of this proposition of fact. (Rec., 267, 328, 331, 460, 465, 500.) When, therefore, the trial court said that "Hecht and Finn were 'selected' by the respondents as their 'agents' to operate a partnership," the court fell into grievous error.

Exhibit B creates no such relation, but does create exactly the converse of that relation.

Respondents Not Partners Within Definition in Uniform General Partnership Act.

But petitioners argue that all of the parties were general partners within the definition contained in Section 6 of the Uniform General Partnership Act.

That section is as follows:

> "A partnership is an association of two or more persons to carry on as co-owners a business for profit." (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 6.)

The association must be for the purpose of, and with the *intention* to

(a) carry on
(b) as co-owners
(c) a business for profit.

If there is an association of two or more persons formed for the purpose and with the intention to do these things there is a partnership, otherwise not. That is what Section 6 means. It could not be plainer if the word "intention" had been used.

But,

(1) The certificate holders under Exhibit B (the Hecht-Finn Trust Agreement) did not form an association. They formed a trust modeled along the lines of a so-called "Massachusetts Trust."

(2) Neither the certificate holders under Exhibit B, nor Hecht or Finn, nor any of them, formed an association with Marcuse and Morris "to carry on" this business. The court will have in mind that Section 6 relates to a general partnership. The words "to carry on" clearly contemplate an association in which each member is to participate in carrying on, *i. e.*, managing and conducting the business. Limited partners do not carry on or manage, conduct or control a business. These things are done by the general partners. Therefore, one who enters into or assists in forming an association to be composed of both general and limited partners, in which he is to be only a limited partner and have nothing to do with the management, conduct or control of the business, does not go into an association "to carry on" the business, for the business is to be carried on, not by him or by him in conjunction with the others, but by the general partners. Indeed, a limited partner must refrain from taking part in the management, conduct or control of the business, for otherwise he might expose himself to the liability of a general partner, and *no one but Marcuse and Morris had any such intention.*

(3) The certificate holders under Exhibit B were not co-owners. George M. and Clement Studebaker were not co-owners. The latter were not even certificate holders. Section 6 of Exhibit B (Rec., 244, 29), in language as plain as could be used, excludes the idea of the certificate holders being co-owners. We quote from that section as follows:

> "The holders of Trust Certificates shall have no right, title or interest, directory, proprietary or

otherwise, in the said copartnership, or in or to the property or assets of said copartnership, the entire right, title and interest therein and thereto, both legal and equitable, being vested in the Trustees," etc.

Many times during their brief do petitioners assert that the certificate holders controlled this business. This was not true. Vette, Zuncker, Regensteiner, Hoffman and the Studebakers had nothing to do with the management and control of this business. The same is true of Hecht and Finn, for limited partners neither manage nor control the business.

Much is said about the provisions of Section 5 of Exhibit B (Rec., 244, 28, 29) relating to dissolving the partnership and winding up the business. Respondents seek to magnify this into control of the business.

There is a wide distinction between a conditional right to cause the termination of a business and having the management and control of it, which petitioners overlook or ignore. The certificate holders could, under the conditions stated, bring about the winding up of the business. *Under no circumstances did they have anything to say or do in the management, control or conduct of the business.* This is clearly recognized by the court of appeals in its opinion. (Rec., 744.)

(4) These respondents did not share in the profits of the business *as profits.* See this brief pages 94, 97 for authorities which remove this proposition from doubt.

They had no right to, or proprietary interest in, profits as they were being earned and while undivided. There was no communion of profits giving respondents control as principals over the conduct of the business. After profits were divided and the share due the limited partners was paid over to Chicago Title & Trust Company *and thus ceased to be profits and became a part of the trust fund,* the certificate holders' right to a distribution

of this fund arose and when distributed it was the distribution of a trust fund and not the profits of Marcuse & Co.

The court of appeals was clearly right in its statement that under the law, as it was prior to the adoption of the uniform partnership act, *the existence of a general partnership as between alleged partners was a question wholly of their intention to be gathered from their agreement.*

Section 6 of the General Partnership Act is to the same effect. Without the intention to be general partners there is no general partnership and this intention must be gathered from the contract which the parties have entered into. Section 7 (1) adds the finishing touch for, in language too plain to admit of construction, the legislature has declared that if parties are not partners as between themselves they are not partners as to third persons. (Hurd's Rev. Stat. of Ill., 1921, Ch. 106a, Sec. 7 (1)).

The Oklahoma Statute on partnership (Comp. Stats. Okla. Anno. 1921, Sec. 8103) contained this definition:

> "Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them."

The association must be for the purpose of "carrying on business together," etc. The Supreme Court of Oklahoma held that under this statute parties must *intend* to form a partnership.

> *McKallip* v. *Geese,* 30 Okl. 33, 118 Pac. 586.
>
> *Municipal Paving Co.* v. *Herring,* 50 Okla. 470; 150 Pac. 1067, 1069.

It seems plain, and the Circuit Court of Appeals accordingly correctly held, that under the general partnership act, none of the Respondents are general partners of Marcuse & Co. and liable for its debts.

II.

EVEN IF HECHT AND FINN WERE LIABLE AS PARTNERS (WHICH IS DENIED) THESE RESPONDENTS WOULD NOT BE LIABLE.

The Court of Appeals, having reached the conclusion, that Hecht and Finn are not general partners of Marcuse & Co., and that therefore the other respondents could not be, did not discuss the other questions, applicable to the respondents other than Hecht and Finn.

It is submitted that, as to these respondents, the same conclusion on those issues, must necessarily have been reached.

Even if the Limited Partnership Act, and Section 11 thereof, and the General Partnership Act, had no effect, and Hecht and Finn were therefore *forced* by operation of law into the position of general partners, nevertheless, we contended, and now contend, that the other respondents were not, and could not be held to be partners.

No Element of Estoppel.

There is no element of estoppel in this case, either in fact or in law. Hecht and Finn never held themselves out as anything other than limited partners (See this Brief, p. 10.) (Rec., 528.) There is no evidence that any creditor ever believed them anything else, or acted on their credit.

As to the other respondents, some of whom held certificates under Exhibit B, there is not the slightest evidence that any creditor of Marcuse & Co. ever heard that any of them had any relation to Marcuse & Co., or ever extended any credit to that firm because of ever having heard of them in connection with it.

But even if that were not the fact, in bankruptcy proceedings to justify a finding that a person is a partner, there must be evidence from which the court can find as a fact that he *is* a partner. There must be an actual partnership. An estoppel operates only in favor of those particular creditors who have been misled by a "holding out." A bankruptcy proceeding is for the benefit of all creditors, and all must stand upon the same footing. The doctrine of partnership by estoppel has no place in any bankruptcy proceeding—much less here.

> *In re Kaplan* (C. C. A. 7), 1916, 234 Fed. 866.
>
> *In re Pinson & Co. et al.* (Dist. Ct. Ala.), 180 Fed. 787, 789.
>
> *Jones* v. *Burnham, Williams & Co.* (C. C. A. 3rd Cir.), 138 Fed. 986.
>
> *In re Clark* (Dist. Ct. Wash.), 1901, 111 Fed. 893, 894.
>
> Collier on Bankruptcy (11th Ed. 1917), p. 167.

The Status of the Parties Must be Determined From the Written Instruments, Exhibit A and Exhibit B.

The basic relations of the parties must be determined from the two written instruments, viz; the Limited Partnership Agreement (Exhibit A), and the Hecht-Finn Trust Agreement (Exhibit B).

Exhibit A and Exhibit B are signed and executed written instruments. By the most elementary principles of construction the agreement of the parties who executed them must be determined from the face of the instruments themselves. No one can read them without understanding exactly and precisely what the parties agreed.

At the hearing upon the partnership issue *petitioning creditors introduced in evidence* the limited partner-

ship agreement Exhibit A as petitioners' Exhibit 3 (Rec. 239, 20); also the trust agreement (Exhibit B) as petitioners' Exhibit 6 (Rec. 244, 26).

Petitioning creditors also introduced in evidence certain of the trust certificates issued under Exhibit B and asked for an admission that all of the certificates issued under Exhibit B by Chicago Title & Trust Company were in like form (Rec. 253, 254, 255, 334).

They introduced these documents as links in their chain of evidence by which they sought to lay the foundation for their contention that all of the respondents are liable for the debts of Marcuse & Co.

Where there is a written and signed agreement on the subject, the partnership question must be determined from the language of the contract itself.

> *Fougner* v. *First National Bank of Chicago*, 141 Ill. 125, 128.
>
> *Grinton* v. *Strong*, 148 Ill. 587, 596.
>
> *Mayfield* v. *Turner*, 180 Ill. 332, 336.
>
> *Stettauer et al.* v. *Hamlin, etc.* 97 Ill. 312, 318.
>
> *Hendricks* v. *Webster* (C. C. A. 8th Cir.), 159 Fed. 927, 929.
>
> *Standard Sewing Mach. Co.* v. *Leslie* (C. C. A. 7th Cir.), 78 Fed. 325, 328.

Such written contract, *creating a partnership*, must itself fix the fact as to who are the partners.

Extraneous evidence will not be heard to contradict such written partnership contract, nor can it be contradicted or explained by previous agreements or attempted agreements.

> *Clark* v. *Mallory*, 185 Ill. 227, 232.
>
> *Evans* v. *Hanson*, 42 Ill. 234, 237.
>
> *Pierpont* v. *Lanphere*, 104 Ill. App. 232, 236.

Beecher v. *Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

Gardt v. *Brown*, 113 Ill. 475, 479.

Schultz v. *Plankinton Bank*, 141 Ill. 116, 120.

Although the rule which forbids the introduction of evidence as to conversations, negotiations or transactions antedating the execution of a written instrument, in order to show what the parties to such instrument intended, does not generally apply as against one who is a *stranger* to the instrument, yet this exception does not hold in favor of a *stranger* who bases his claim, or his right to recover, upon the written agreement or asserts rights which originate in it, or who relies upon such instrument in whole or in part to establish his claim. If he relies upon the document to establish any part of his claim he cannot go behind it, but is as much bound by its terms as is a party to it. In such a case the general rule which forbids the introduction of extraneous evidence applies exactly as between the parties themselves.

Schultz v. *Plankinton Bank*, 141 Ill. 116, 120, 123.

Hendricks v. *Webster* (C. C. A. 8th Cir.), 159 Fed. 927.

Spingarn v. *Rosenfeld*, 24 N. Y. S. 733, 736.

Current v. *Muir*, 99 Minn. 1, 108 N. W. 870.

Union Machinery & Supply Co. v. *Darnell*, 226 Wash. 154, 154 Pac. 183, 185.

Wigmore, Evidence, Vol. 4, pp. 3409, 3451.

Elliot, Evidence, Vol. 1, p. 646, 647.

Ruling Case Law, Vol. 10, p. 1021.

Corpus Juris, Vol. 22, p. 1294.

Jones (1913) Commentaries on Evidence, Vol. 3, p. 220.

Here the petitioning creditors necessarily rely on the written instruments, Exhibits A and B. (Rec., 20, 26.) It is, by these instruments (the Limited Partnership Agreement and the Trust Agreement) that they seek to bind Marcuse, Morris, Hecht, Finn and these respondents together. They introduced them in evidence as a part of their case (Pet. Ex. 3, Rec., 239, 20; Pet. Ex. 6, Rec., 244, 26) and are bound by the same rule as a party to them would be.

It follows that the terms of these contracts Exhibits A and B, must prevail, as determining what agreements the parties made among themselves.

It clearly appeared that the certificate holders paid their money in sole reliance on the Exhibit B arrangement, and that all of the parties perfectly understood it.

A.

THE HECHT-FINN TRUST AGREEMENT CREATED A TRUST AND DID NOT ESTABLISH ANY PARTNERSHIP RELATION.

Under the signed instrument (Exhibit B), Hecht and Finn were trustees, and the certificate holders were *cestuis que trust*. No partnership relation was thereby created between Hecht and Finn and these respondents.

The limited partnership contract, Exhibit A, provides that Marcuse and Morris shall be general partners, and that Hecht and Finn shall be limited partners with limited liability only. These respondents are not mentioned in Exhibit A. They did not sign it and are not parties to it.

Analysis of Exhibit B.

Exhibit B was executed by Hecht and Finn *alone*. It was accepted in writing by the Chicago Title and Trust Company. Marcuse and Morris executed a specific *consent* that Hecht and Finn might make the Ex-

hibit B contract which included the direct agreement that those who became certificate holders:

(a) Should have no interest, legal or equitable in the property or assets of the partnership (Ex. B., Sec. 6, Rec. 29);

(b) Should acquire no interest whatever in any proceeds arising from the partnership, until after the same were *segregated and separated therefrom.* (Ex. B, Secs. 1, 2, 4, 6; Rec. 26, 27, 28, 29);

(c) Should have no control whatever over the management of the business of Marcuse & Co.

An examination of Exhibit B also discloses that Hecht and Finn recited that they had theretofore become special partners in the limited partnership created by Exhibit A. Under that document (Exhibit A) it was provided that they should have no liability whatever beyond their contributions of $95,000 each (Ex. A, Secs. 2, 14; Rec. 20, 23), and should have no control over the partnership operations. (Rec. 20 *et seq.*) They were to receive six per cent on their invested capital, and in addition thereto a certain proportion of the net profits which might arise from the operations of the limited partnership. (Ex. A., Secs. 12, 13; Rec. 22, 23.) On dissolution they were to receive a share of the assets in the proportion to which they should be entitled to the same. (Ex. A, Sec. 19; Rec. 25.)

Hecht and Finn declared in Exhibit B (Rec. 26) that they were holding their interest as limited partners upon trusts and conditions which were in substance as follows:

That whenever profits accrued to them as special partners, or whenever proceeds of liquidation *after* the special partnership was dissolved accrued to them, these moneys would be paid over to Chicago Title and Trust Company and be by it distributed in 380 parts or shares among those who from time to time held certificates from the trust company authorizing them to receive such share distributions. (Ex. B, Secs. 1, 2, 3, 6; Rec. 26, 27, 28.)

These certificates were assignable (Ex. B, Secs. 3, 6; Rec., 27, 29), and anyone might become a holder thereof (as in fact from time to time they did Rec., 606, 610, 611, 640), in any number of shares. It was provided that the certificate holders had no rights or interest whatever in the assets, or in the profits, of Marcuse & Co. *as such*, or in its operations, and they became entitled to nothing whatever except only the profits, and the proceeds of liquidation *after* the same had been segregated from the partnership property and paid over to the trust company on behalf of the special partners. (Ex. B, Secs. 1, 2, 4, 6; Rec. 26, 27, 28, 29.)

Under Exhibit B the certificate holders had nothing to do with the management of the business of Marcuse & Co. There is no provision for meetings of the certificate holders or for the election of trustees by them. *The certificate holders had no authority to remove trustees or to fill vacancies among the trustees.* In the event of the death of both trustees, the holders of certificates representing a majority of the outstanding shares may, by an instrument or instruments in writing signed by them, designate a successor trustee, *acceptable to and approved by the general partners,* which simply means that they may agree with the general partners upon a successor trustee. (Ex. B, Sec. 9; Rec., 30, 31.)

The trustees had power to appoint auditors of the partnership business and if the holders of certificates representing a majority of the outstanding shares should so indicate the trustees were to revoke the appointments of such auditors and appoint those thus designated by the certificate holders. (Ex. B, Sec. 5; Rec. 28, 29.) Should such auditors at any time certify in writing to the trustees or to the certificate holders that the business of the co-partnership was not being properly

conducted or that Marcuse (general partner) was neglecting the business or by reason of incapacity was not properly managing the business, the trustees should, upon the written direction of the holders of certificates representing a majority of outstanding shares, take steps to dissolve the copartnership. (Ex. B, Sec. 5, Rec., 28, 29.)

Upon the resignation of the trust company, a successor trust company might be appointed by an instrument or instruments in writing, signed by certificate holders representing a majority of the outstanding shares. (Ex. B, Sec. 9; Rec., 31.) Such a majority might in writing direct the trustee to maintain a suit for the dissolution of the copartnership, or for any relief against it, or to protect or enforce distribution of the trust fund. Ex. B, Sec. 7; Rec., 30.) The certificate holders had access to the books of account of the firm of Marcuse & Co., and were entitled to receive from the trustees an annual inventory and account and monthly trial balances covering the business and assets of the copartnership, as and when the same were obtained by the trustees from the general partners. (Ex. B, Sec. 5; Rec., 29.)

It is contended by these respondents that under this document Hecht and Finn stood in the relation of *trustees,* and those who from time to time might purchase and hold certificates stood as *cestuis que trust,* and that this relation and no other was created by Exhibit B.

Petitioners assert that Exhibit B does not create a trust.

Conclusive answer to this will be found in Crehan v. Megargel, 192 N. Y. S. 290, 234 N. Y. 67, 136 N. E. 296.

Particular attention is again directed to Section 6 of Exhibit B heretofore quoted (see this brief, p. 7).

In essence the adjudicated cases hold that where the trustees, as here, have control of the capital fund, and the rights of the shareholders are passive and receptive, and they have no control or direction of the acts which the trustees shall perform, or the manner in which they shall conduct the fund or business from which the distributed amounts are arising during the continuance of the relation, then, and in such case, *the relation is that of trustee and cestuis que trust, and not of partners.*

Tested by the authorities, Exhibit B did not create a *partnership* between Hecht and Finn on the one hand and the certificate holders on the other, nor between the certificate holders and Marcuse and Morris.

Among the cases which hold this are:

Crehan v. *Megargel,* 192 N. Y. S. 290, 234 N. Y. 67; 136 N. E. 296.

Williams v. *Milton,* 215 Mass. 1, 10, 11; 102 N. E. 355, 358, 359.

Crocker v. *Malley* (1919), 249 U. S. 223, 232, 233.

Mayo v. *Moritz,* 151 Mass. 481; 24 N. E. 1083.

Johnson v. *Lewis,* 6 Fed. 27, 28.

Wells-Stone Mercantile Co. v. *Grover,* 75 N. W. (N. Dak.) 911, 916.

Jones v. *Gould,* 209 N. Y. 419, 424.

Crehan v. *Megargel, supra,* is the latest case of which we have knowledge and we submit it is conclusive.

The New York courts held that the trust instrument in question created a trust and that the certificate holders were not "persons interested" in Megargel & Co. within the meaning of the statute in question or liable as partners.

The Court of Appeals said (234 N. Y. 77):

> "We do not think that they did contribute special capital to the partnership in any such manner or with any such result as is claimed. Clearly they did not contribute capital in the manner, under the conditions and with the results, contemplated by the statute as necessary to establish the status of a special partner."

Again, p. 78:

> "As between them and the other members of the copartnership they made no contribution of capital, signed no partnership agreement and established no relationship with the copartnership, but were expressly debarred therefrom, and secured no benefit from such copartnership except as it might come in an indirect way through accountability of the special partner for the profits, which he had received from the copartnership."

Again, p. 79:

> "The trust is an insurmountable barrier raised between them and the partnership and separating them from an interest in its affairs, and it seems to us to be a valid arrangement and to come within the principles which have been approved both by eminent text writers and the decisions of various jurisdictions in the case of so-called comercial or business trusts as substitutes for business corporations."

The trust agreement passed upon in the case of *Crocker* v. *Malley supra,* and held by this court to create a trust and not a partnership is of particular interest in this case because similar in principle to Exhibit B. It is set forth in the appendix, p. lii.

In the trust agreements examined by the courts in the cases cited *supra* (as also in Exhibit B), there was no provision for an associating together of certificate holders in meetings, but recent decisions in the following cases hold that even though a trust agreement provides for meetings of certificate holders for the election

of trustees, it does not, by reason of such provision, create a partnership.

> *Home Lumber Company* v. *Hopkins*, (1920), 190 Pac. (Kans.) 601, 604.
>
> *R. I. Hospital Trust Co.* v. *Copeland*, 98 Atl. (R. I.) 273, 279.

Space forbids that we analyze all of the cases cited *supra*, in connection with this branch of the case, but they are all in point and clearly sustain our contention as to the status of the certificate holders under Exhibit B and establish beyond question that these certificate holders were not partners either limited or general in the firm of Marcuse & Co.

The court should have in mind the three positions occupied by Hecht and Finn. First, they were limited partners under Exhibit A. (Rec., 20.) Second, they were trustees under Exhibit B, and third, they were certificate holders under Exhibit B. (Rec., 26.) As certificate holders their positions differed vitally from those which they occupied as trustees and as limited partners. Their status as such trustees and as such partners was definitely fixed by the terms of Exhibits A and B, but they might at any time cease to be certificate holders by the transfer of their certificates (Exhibit B, Sections 3, 6; Rec., 27-29) and their status as trustees and limited partners was in no wise dependent upon their continuing to be certificate holders.

There is no decision in Illinois in any way in conflict with the principles laid down in the cases cited in support of the proposition that the Hecht-Finn Trust Agreement did in fact create a trust and did not create a partnership relation of any kind. In the court below opposing counsel apparently relied on *Robbins* v. *English*, 24

Illinois, 387. In this case members of a real estate firm made a declaration of trust as to certain real estate for the benefit of Chicago Loan Company, under which name a number of persons had associated themselves together and entered into written articles of association between themselves and members of the firm. In considering the competency of testimony of certain witnesses the court remarked that joint stock companies are nothing more than partnerships. It does not appear from the case what the powers of the shareholders were under the articles of association with reference to the control of its affairs, but the court treated it as a joint stock company. For aught that appears in the opinion, the provisions of the articles of association were such that the court was correct in so doing. Moreover, there is no indication in the opinion that anyone questioned that the articles of association were such as to make the shareholders partners.

Pettis v. *Atkins*, 60 Ill. 454, *People* v. *Rose*, 219 Ill. 446 and *Fougner* v. *First National Bank*, 141 Ill. 24, are other cases similarly relied on. In the first case no trust question was raised and from the opinion it is clear that the organization involved was a joint stock company controlled and managed by the stockholders, associating and acting together at meetings and electing officers and directors who were their agents. In the *Rose* case certain persons brought mandamus proceedings against the Secretary of State because he refused to let them incorporate under the name United States Express Company, because the name was already being used by a joint stock company. A demurrer to his answer admitted that the old company was a joint stock association and the court so treated it (as it was bound to do) and pointed out further that it was unable to say what the terms of the articles of association were be-

cause not set forth in the pleadings. In the *Fougner* case it was held that one who claimed to be a creditor and employee was in fact a partner because of the character of the work done and authority exercised by him.

Petitioners point to Section 5 of Exhibit B (Rec., 28, 29) which gave the holders of trust certificates the right in person or by agent at reasonable times to examine the partnership books of account and which provided that the trustees (Hecht and Finn) should at least once a year furnish to the certificate holders an inventory and account of assets, income, profits, losses sustained, liabilities incurred, etc., of said partnership, but this is no evidence of partnership.

Where one is to receive a percentage of profits as compensation for services rendered or for the use of money or property in a business he may maintain a bill in equity for an accounting.

> *Channon* v. *Stewart*, 103 Ill. 541, 543.
> *Street* v. *Thompson*, 229 Ill. 613, 618, 619.

Inasmuch as such a person is interested in knowing whether profits have been made and, if so, what they are, because his compensation is to come from profits and it cannot be told what his compensation is to be without such information, *he may have an accounting in equity, but he is not a partner*. Would it not be absurd to hold that a provision in a contract designed to give him what the law gives him, makes him a partner, when, if the contract contained no such provision, and he procured an examination of the books through the aid of the court, he would not be a partner, or that a provision in a trust instrument that he shall have access to the partnership account books from time to time in order to know how the business is being managed makes him a partner.

In *Crehan* v. *Megargel, supra,* the trust instrument provided that in case of the death of Ralph G. Megargel, the trustee and limited partner, and the dissolution of that firm, the receipt-holders were entitled to receive from the firm the residue, if any, of the moneys to which their trustee would have been entitled if living. Observe that in this case the residue of the assets belonging to the limited partner were not to be paid to the trust company and distributed by it to the registered receipt-holders as in Exhibit B, but the receipt-holders were entitled to receive such residue of the assets direct from the firm, and as to this arrangement the Court of Appeals of New York said (234 N. Y. 78):

> "But this was the arrangement which equity would have enforced without any specific agreement and did not change the effect of their agreement."

In *National Surety Company* v. *Winslow,* 173 N. W. (Minn.) 181, in which the court held that the contract in question did not create a partnership. The court said p. 182:

> "The whole scope and effect of the various stipulations of the contract by which interveners were given a supervisory control over the performance of the contracts, to facilitate which the advances or loans were made, was in protection of their granted right to have the money so advanced devoted to the particular purpose, and not diverted to the performance of other contracts, in which interveners had no interest, or the personal uses of the defendant."

Inasmuch as profits earned by Marcuse & Co. were to be paid to Chicago Title & Trust Company as a trust fund the beneficiaries of that trust were entitled to know that the business was being honestly conducted and the profits honestly divided.

The provision in Exhibit B that they should have that right did not change their legal status.

In *Williams* v. *Milton, supra* (215 Mass. 1, 102 N. E. 355), the trust instrument provided that the trustees should render an account annually or oftener if convenient to them and should upon request deliver or mail a copy to each *cestui que trust*.

In *Crocker* v. *Malley, supra* (249 U. S. 223), the trust instrument provided that the trustees should at all times keep full and proper books of account and records of their proceedings and doings and should at least annually render account of the trust to any beneficiary requesting the same. (See Section 7, Appendix A to our main brief, p. 109.)

Under Section 5 in Exhibit B (Rec., 28, 29) it is made the duty of the trustees (Hecht and Finn) to appoint persons or firms to act as auditors of the business of Marcuse & Co., and this paragraph provides that such trustees might and would from time to time revoke such appointments and appoint such other persons or firms as the holders of certificates representing a majority of the outstanding shares should in writing designate and require.

What we have said as to the right of the holders of certificates to examine the books of account is clearly applicable here. This provision was simply designed to procure the selection of such auditors as would be satisfactory to the certificate holders. It had nothing to do with the management or control of the business but related solely to the audit of the firm's books of account.

Petitioners point to the further provision in Section 5 of Exhibit B (Rec., 28, 29) to the effect that if the auditors should certify in writing that the business of the firm

was not being conducted in a safe, conservative or judicious manner, or that Marcuse was neglecting said business, or was incapacitated, and by reason thereof, not properly managing said business, such auditor's certificate should be conclusive and binding evidence of the facts therein recited not only as between the trustees and the certificate holders, but as between the trustees and the general partners, and the trustees should upon the written direction of the holders of certificates representing a majority of the outstanding shares, cause steps to be taken to dissolve said copartnership, and it is argued that this was a provision vesting control in the certificate holders.

This provision gave no proprietary interest or ownership as principal in the business nor control over its conduct and management. There is a wide difference between controlling the conduct and management of a business, and taking steps to dissolve or terminate it. If Marcuse & Co. through the management of its general partners, and of Marcuse particularly, was not conducting the business in a proper manner, or if Marcuse should become incapacitated to properly manage the business it was the duty of Hecht and Finn to take steps to dissolve and wind up the partnership, and if they did not discharge their duty in that regard, the beneficiaries under Exhibit B could procure relief through a court of equity. This provision is in nowise inconsistent with our contention as to the character of Exhibit B and the position of the certificate holders, and has no tendency to create a partnership.

What we have just said is equally applicable to Section 7 of Exhibit B. (Rec., 29, 30.)

Section 9 of Exhibit B provides that in the event of the death of both trustees (Hecht and Finn) the holders of certificates representing a majority of the shares, by an instrument or concurrent instruments in writing signed by such certificate holders shall designate a successor trustee *acceptable to and approved by* the general partners and that such successor trustee shall forthwith become the special partner in the place and stead of the deceased surviving trustee, etc.

This provision could be eliminated entirely from Exhibit B without in anywise destroying the completeness of that document. It amounts to no more than a provision that upon the death of both Hecht and Finn the then certificate holders might agree with Marcuse and Morris upon the selection of some person to step into the shoes of Hecht and Finn and succeed them as trustee under Exhibit B, and as special partner under Exhibit A and thus acquire all the rights of Hecht and Finn and assume all their obligations as provided in Exhibit A and Exhibit B, and this they could do without any provision to that effect in Exhibit B.

In the trust instrument involved in *Crehan* v. *Megargel, supra,* the provision was made between the receipt-holders that if the firm of Megargel & Co. should be terminated by the death of Megargel within the period of five years, which was to be the life of that firm, on the consent of the surviving members of the partnership and the agreement of not less than 51 per cent in amount of the receipt-holders a new limited or special partnership might be formed with a new limited or special partner, nevertheless the New York courts held that the relationship of the receipt-holders was a trust relationship and that they were not partners.

The certificate holders could not remove the trustees.

They could not fill vacancies. The trustees did not serve for fixed terms with power in the certificate holders to elect their successors. The certificate holders could not adopt rules and regulations for their government or control. No meetings were provided for at which certificate holders, by vote, could exercise any authority or control over the trust fund or the trustees or the business of Marcuse & Co. It is true that Section 5 of Exhibit B. (Rec., 28, 29) provided that the trustees should appoint such persons or firms as auditors as the holders of certificates representing a majority of the outstanding shares should in writing designate and require. Section 7 (Rec., 29, 30) provided that trust certificate holders representing a majority of the outstanding shares might request the trustees to bring suit under certain conditions and Section 9 provided that, in the event of the death of both trustees, certificate holders representing a majority of the shares, by an instrument or concurrent instruments in writing, might designate a successor trustee *acceptable to and approved by* the general partners. *These provisions provide only for individual action,—not for meetings of certificate holders or for any associating together.*

In *Williams* v. *Milton* (215 Mass. 1, 102 N. E. 355) the trust instrument provided that the trustees might *with the consent of three-fourths in interest* of the beneficiaries under the trust, alter or add to the trust instrument or terminate the trust. The court said that the giving or withholding of such consent *was not to be had in a meeting, but was to be given by them individually and that no meetings were provided for under that trust instrument.*

Referring to the Wachusett Realty Trust (Appendix p. lii), which was the instrument involved in *Crocker* v. *Malley*, 249 U. S. 223, it was provided in Section 11 that

any vacancy in the office of the trustee should be filled by remaining trustees by an instrument in writing signed by them *and assented to in writing by the holder or holders of a majority in amount of the beneficial interests therein;* and it was provided in Section 13 that the terms and provisions of the trust might be modified by instruments in writing signed, sealed and acknowledged by the then trustees and *assented to in writing by a majority in interest of the beneficiaries, etc.*

This court in referring to these provisions (p. 232) quoted from *Williams* v. *Milton, supra,* to the effect that *the giving or withholding of assent was not to be done in a meeting, but by the certificate holders individually.*

In other words, the provisions of Exhibit B relative to action by the certificate holders representing the majority of outstanding shares, *is not the equivalent of a provision for an associating together in meetings and acting therein, and is not the control contemplated by law which certificate holders must have over trustees to constitute a partnership.*

How can it be said that the certificate holders under Exhibit B were the masters of the trustees and the trustees merely agents? How can it be said that the certificate holders were principals in the business of Marcuse & Co. on their own behalf and agents as to all others concerned? What could they do to bind Marcuse & Co.,

They could not hire or discharge a clerk.

They did not have the slightest control over any one in the employ of that firm.

They could not have purchased a postage stamp and obligated Marcuse & Co. to pay for it.

They could not give an order for a customer which any one connected with the management of the business was under any obligation to carry out.

They had no authority to bind Marcuse & Co. directly or indirectly in any way in the conduct and management of the business of the firm, and its members had no authority to bind them by anything done or any obligation incurred in connection with the management and control of the business. The relationship of principal and agent did not exist between the certificate holders and the trustees under Exhibit B, or between the certificate holders and the members of the Marcuse & Co.

Clearly under Exhibit B Hecht and Finn became trustees, but as tersely said by this Court in *Taylor* v. *Davis*, 110 U. S. 330, 334:

"A trustee is not an agent."

Sharing Profits.

The rights of Hecht and Finn in and to profits of Marcuse & Co. and proceeds upon liquidation could be made the subject of a trust. Hecht and Finn made them the subject of The Hecht-Finn Trust by the execution of Exhibit B.

Instead of Marcuse & Co. paying profits or assets in the distribution of capital direct to Hecht and Finn, and Hecht and Finn holding the trust fund for distribution or paying it over to Chicago Title & Trust Company, payments into the trust fund were to be made direct to Chicago Title & Trust Company by whom that fund was to be taken and distributed. Upon the payment by Marcuse & Co. to Chicago Title & Trust Company of profits or of a portion of the capital, upon liquidation, the moneys thus paid at once became a part of this trust fund and were to be distributed *as such* by Chicago Title & Trust Company among the certificate holders in proportion to the number of shares held by each of them. (Sec. 2, Ex. B, Rec., 26, 27.) The certifi-

cates issued under Exhibit B provided that the certificate holder should be entitled from time to time to distribution *from said trust fund* in the manner and upon the terms and conditions set forth in Exhibit B. (Rec., 26, 27.)

Counsel argue that the certificate holders shared in the profits of Marcuse & Co. and that this made them partners. To this we reply:

The sharing of profits as profits in a business is not a conclusive test of partnership.

> *Niehoff* v. *Dudley*, 40 Ill. 406, 410.
> *Smith* v. *Knight*, 71 Ill. 148, 151.
> *National Surety Co.* v. *Townsend Brick Co.*, 74 Ill. App. 312, 315; affirmed 176 Ill. 156, 161.
> *Sample* v. *Farson*, 174 Ill. App. 334, 338.
> *Williams* v. *Fletcher*, 129 Ill. 336.

The fact that a person shares in the profits of a concern is *prima facie* evidence that he is a partner, but that presumption yields to proof of a contrary intention.

Even if it were conceded (which it is not) that the certificate holders share in the profits of Marcuse & Co., as profits, the result would be merely to raise the presumption of partnership, which is effectively rebutted by the language of Exhibit B, which shows conclusively that the parties never intended to thereby create a partnership.

The sharing in profits which is *prima facie* one of the evidences of partnership must be a sharing in profits *as profits.* Concede that the trust fund which was distributed among the certificate holders was made up of profits paid by Marcuse & Co., it is not the fact that the certificate holders shared in profits *as profits.* These funds in the hands of Chicago Title & Trust Company *were no longer profits*, but constituted a trust

fund, and it was the *trust fund* that was distributed among the certificate holders.

If it be said that the distinction which we here make is not substantial, we reply that it is as firmly established in the law as the solemn decisions of courts of final authority can establish anything.

Receiving a percentage of profits as compensation for the hire or use of money does not make one a partner.

Smith v. *Knight*, 71 Ill. 148, 150, 151.
Niehoff v. *Dudley*, 40 Ill. 406, 409, 410.
Cassidy v. *Hall*, 97 N. Y. 159, 168.
James Bailey Company v. *Darling*, 111 Atl. (Me.), 410, 412, 413.

Receiving a percentage of profits as compensation for services does not make one a partner.

National Surety Co. v. *Townsend Brick and Contracting Co.* 74 Ill. App. 312, 315; affirmed 176 Ill. 156, 161.
Briggs v. *Kohl*, 132 Ill. App. 484, 486, 487.
Cassidy v. *Hall*, 97 N. Y. 159, 168.
Merchants National Bank v. *Barnes*, 52 N. Y. Supp. 786, 789.
Jackson v. *Haynie's Admr.* 109 Va. 365, 56 S. E. 148.
Holbrook v. *O'Berne*, 9 N. W. (Ia.) 291.

Receiving a percentage of profits as compensation for the use of property does not make one a partner.

Parker v. *Fergus*, 43 Ill. 437, 441.

In the foregoing cases the courts made it clear that the parties sought to be held as partners did not receive a percentage of profits *as profits* but as compensation for the hire or use of money or property or for services rendered, as the case might be.

The expression "profits *as such*" or "profits *as profits*" and the distinction which these expressions indicate appear in many cases.

> *Kelly* v. *Gaines*, 24 Mo. App. 506, 514, 515.
>
> *In re Haines & Co. Estate*, 176 Pa. 354; 35 Atl. 237, 238.
>
> *Merchants National Bank* v. *Barnes*, 52 N. Y. Supp. 786, 789.
>
> *Parker* v. *Fergus*, 43 Ill. 437, 441.
>
> *Burnett* v. *Snyder*, 81 N. Y. 550, 555.
>
> *Briggs* v. *Kohl*, 132 Ill. App. 484, 486.
>
> *James Bailey Company* v. *Darling*, 111 Atl. (1920, Me.), 410, 413.

In *Kelly* v. *Gaines*, *supra*, the court said (p. 514):

> "The expression 'profits, as such,' used in the case last cited and referred to, *means profits before they are ascertained and divided*, and not profits which, after they have been ascertained, make the fund for, and form the measure of the payment, to the alleged partner on account of his interest." (Citing Parsons on Partnerships (2 Ed.), Chap. 6, Sec. 2, p. 73.
>
> "Under the facts hypothetically stated in the instruction given for the plaintiffs, as constituting Minter a partner, *he had no interest in the profits while accruing; his interest began only when the profits had been ascertained; until then he had no interest in or control over them.* HE HAD NO INTEREST IN THE PROFITS AS SUCH; he simply had an interest in the profits as constituting the fund out of which he was to receive the compensation of $10 on each carload of meal, guaranteed by Gaines. Such profits thus paid to him were paid to him as a compensation for furnishing the corn to Gaines, and were not paid to him as Gaines' partner. *There was no communion of profits between Minter and Gaines;* the interest in the profits was not mutual; Minter had no interest in the profits as a principal trader."

A party sought to be held as a partner must be inter-

ested as owner in the resulting profits *while they are undivided and remain as profits.*

Jackson v. *Haynie's Adm'r. supra* (56 S. E. 148).

There must be a *proprietary interest* as *principal trader* in the profits *as they are earned and before division.*

Burnett v. *Snyder, supra,* 81 N. Y. 550, 555.

James Bailey Company v. *Darling, supra,* 111 Atl. (Me.) 410.

Ruling Case Law, Vol. 20, pp. 829, 830.

In the Darling case, *supra,* the Supreme Court of Maine said (p. 413) that for one to share in profits *as profits*

> "is to stand in such relations to the business that the profits, or a share of them, are in his ownership as they accrue. *He must have a proprietary interest in each dollar of profits as it is earned,* so that he then has a right of possession or control of it for the purpose of retaining his share. This involves an ownership of an interest in the business that produces the profits."

Under Exhibit B, whether construed alone or in connection with Exhibit A, Vette, Zuncker, Regensteiner, and the two Studebakers had no proprietary interest as principal traders in the profits of Marcuse & Co. as they were being earned and before division.

Section 6 of Exhibit B (Rec., 29) expressly provides

> "that the holders of trust certificates shall have no right, title or interest *directory, proprietary or otherwise* in the said copartnership or in or to the property or assets of said copartnership, the entire right, title, and interest therein and thereto, both legal and equitable, being vested in the trustees" (Hecht and Finn).

And this same section of Exhibit B expressly provides

that the interest of each and every holder of trust certificates shall consist solely of the right to receive his proportionate share of the net part or parts of the *trust fund* from time to time payable to the trust company thereunder, etc. Moreover, by the very terms of the trust certificates the right acquired by the certificate holders thereunder and thereby was to be "entitled from time to time to distribution from *said trust* in the manner and upon the terms and conditions in said declaration of trust set forth"—referring to Exhibit B. Furthermore, Exhibit B does not provide that the certificate holder shall share in the profits of Marcuse & Co., nor that they shall be paid a stated percentage of such profits. The share or percentage of such profits due from time to time to Hecht and Finn as members of Marcuse & Co. by the direction of Hecht and Finn contained in Exhibit B (assented to by the members of Marcuse & Co.) was to be paid to a trust company as a part of a trust fund and what the trust certificate holder was to get was his proportionate share of this trust fund depending upon the number of shares owned by each of them respectively at the time a distribution was made out of this trust fund.

The mere fact that a person is interested jointly with others in the income arising from a business, does not make him their partner. In *Crehan* v. *Megargel* (234 N. Y. 67); *Crocker* v. *Malley* (249 U. S. 223), and in *Williams* v. *Milton* (215 Mass. 1), and in the other trust cases cited, the certificate holders were jointly interested in the profits of an enterprise. They were not partners. In the subpartnership cases cited (cited hereafter, pp. 111, 112), the subpartners were interested in the profits which would accrue to the partners with whom they had contracted. They were not partners.

National Surety Company v. *Winslow*, 173 N. W. 181,

decided by the Supreme Court of Minnesota in June, 1919, was a case where the court held that the relationship was not that of partners, but of creditor and debtor. It was argued that the parties were engaged in a joint adventure. The court said (p. 183):

> "The contract in question clearly creates no such relationship [partnership].
>
> The terms thereof expressly exclude interveners from all liability for the performance or failure to perform the contracts, and expressly declares that defendant shall have no authority to bind them by contract or otherwise in respect thereto. Interveners assume none of the burdens of performance, or the control thereof, other than such as they may deem necessary to prevent a wrongful diversion of the funds advanced, and for a breach of any of the contracts they would in nowise be liable either jointly with defendant or otherwise. In short, the only interest interveners have in the contracts or the performance thereof is the stipulated share of the net profits. But that does not create a copartnership *or a joint adventure.*"

This was a case where the interveners advanced money to the defendant to enable him to carry out certain construction contracts he had. They reserved certain rights of control. Their compensation for the use of the money was to be a percentage of the profits, etc. The contract before the court by its terms excluded them from liability for the performance or failure to perform the construction contracts by the defendant.

Sharing of Losses.

One of the tests of partnership is that of *sharing losses.* If a contract provides for sharing profits and is *silent* on losses, then a presumption arises that losses will be shared; but where the contract affirmatively provides that a party *shall* not share losses, then such party is not a partner.

In *Baldwin* v. *Patrick,* 91 Pac. (Colo.) 828, it is said (p. 829):

> "In *Lee* v. *Cravens,* 9 Colo. App. 272, 288, 48 Pac. 159, 164, it is said: 'Another incident of a partnership is the sharing of losses by the partners. The partnership contract may say nothing about losses, but the right to participate in profits implies a corresponding liability for losses; and it has accordingly been held that an agreement for the division of profits is admissible in evidence as tending to show a partnership. *Where, however, an agreement between two or more persons, in relation to the prosecution of an enterprise, provides that one of their number shall incur no risk, and be* chargeable with no loss, the agreement is not one of partnership.' "

The same doctrine is laid down in

Stafford v. *Sibley,* 17 So. (Ala.) 324, 325.
Clark v. *Barnes,* 34 N. W. (Iowa), 419, 420.
Ruddick v. *Otis et al.* 33 Iowa, 402.
Winter v. *Pipher,* 96 Ia. 17; 64 N. W. 663.
Grantham v. *Connor,* 154 Pac. (Kan.) 246, 247.

Section 6 of Exhibit B provides that the holders of trust certificates by the acceptance thereof shall not be construed to have assumed any liability whatsoever with respect to said trust or said copartnership. (Rec., 29.) In other words, they are not liable for losses.

A provision against liability for firm obligations (Section 6 of Exhibit B clearly contains such a provision) excludes the idea of partnership.

Niehoff v. *Dudley,* 40 Ill. 406, 408, 409.
Sample v. *Farson,* 174 Ill. App. 334, 338.
National Surety Co. v. *Winslow, supra,* 173 N. W. (Minn.) 181, 183.

Agency as a Test of Partnership.

Another crucial test of partnership is *agency.* Each partner is an agent for each of the others, ***and can bind such others by his agreement,*** within the scope of the firm's business. If such agency does not exist, the parties are not partners.

Fougner v. *First Nat. Bank of Chicago,* 141 Ill. 124, 132.

Pierpont v. *Lanphere,* 104 Ill. App. 232, 237.

Beecher v. *Bush,* 45 Mich. 188; 7 N. W. 785; 40 Am. Rep. 465.

Brotherton v. *Gilchrist,* 144 Mich. 274; 107 N. W. 890, 891.

Parchen v. *Anderson,* 5 Mont. 438; 5 Pac. 588, 599; 51 Am. Rep. 65.

It is clear that, under Exhibit B, Hecht and Finn could not bind the successive certificate holders as the agents of such holders. Still less could it be said that the certificate holders could bind Hecht and Finn, by their acts and agreements.

By whatever test is applied to Exhibit B, it is clear that Hecht and Finn, *as trustees,* were not *partners* with the certificate holders.

How could Hecht and Finn be partners with the respective and consecutive certificate holders? Regensteiner bought a certificate for fifty-seven (57) shares and paid Hecht and Finn for it. Then he transferred twenty (20) shares to Grollman, who took a new certificate. Is Grollman a partner of Hecht and Finn? And if Grollman should sell or hypothecate his twenty (20) shares to the First National Bank of Chicago, would *it* become a partner of Hecht and Finn? And still further (parallelling the Studebaker situation), would its di-

rectors, and its stockholders, *as individuals,* also be partners of Hecht and Finn?

Hoffman bought a certificate for one hundred (100) shares. He paid $50,000 for it. He was acting for the Chicago Title and Trust Company, as trustee, and the $50,000 was its money, being part of a *fund* of money and securities, to which it held legal and equitable title, as trustee.

He transferred his certificate to Gardner, an officer of the Chicago Title and Trust Company. Is Gardner a partner?

Gardner held the certificate as a *part* of the fund bought, paid for, and owned, by the Chicago Title and Trust Company, which, as trustee, holds the legal and equitable title to the purchased certificate. Is the Chicago Title and Trust Company *a partner?*

Finally, George M. Studebaker and Clement Studebaker Jr. (or more probably various other persons, depending on the facts of life and survivorship), *at the expiration of the Studebaker Bros. Trust in* 1942, will receive, in varying and uncertain proportions, the *securities* and legal or equitable ownership of the fund. They never bought and do not hold a certificate under *Exhibit B.*

Yet it is contended that George M. Studebaker and Clement Studebaker, as individuals, should be held to be *partners.* Are the other beneficiaries of Studebaker Bros. Trust also partners?

Neither of them ever agreed, orally or in writing, to be a general partner, or a limited partner, or any kind of a partner with any one.

Neither of them ever bought, paid for, owned or held, any certificate under Exhibit B.

We contend that under the terms of Exhibit B, and under every legal test applied to it, Hecht and Finn were trustees, and the certificate holders were *cestuis que trust, and were not partners with Hecht and Finn or with each other* and of course not partners with Marcuse and Morris, and of course that the Studebakers, who are not even certificate holders, were not partners.

Petitioners (Brief, p. 39) point to Hecht's Exhibits 2, 3, 4 and 5 and characterize these documents as "one of the strongest proofs in the record" that all of the respondents never waivered from April 1st until after June 30th in their intention to form a limited partnership and to be all members of that partnership.

Petitioners are pressed hard for evidence to sustain their claim when they make such a contention with reference to these exhibits.

HECHT'S EXHIBITS 2, 3, 4 AND 5.

Counsel for Hecht and Finn introduced on the hearing in the trial court these four documents: Hecht Exhibits 2 (Rec., 665), 3 (Rec., 660), 4 (Rec., 667), and 5 (Rec., 668). Hecht Exhibits 2 and 3 had been canceled by destroying the signatures. These two exhibits were dated March 28, 1917. When the four exhibits were offered in evidence counsel for these respondents objected to them upon the ground that Hecht Exhibits 2 and 3 showed upon their face that they were canceled documents and that Hecht Exhibits 3 and 4 which were dated June 30, 1917, were wholly immaterial. (Rec., 664.) They were admitted in evidence. (Rec., 665.) Hecht Exhibit 2 was an agreement between Marcuse and Vette, and Hecht Exhibit 3 was an agreement between Marcuse and Zuncker. They were precisely alike except as to the

amounts of money stated in each. It will be sufficient, therefore, to note Hecht Exhibit 2, the agreement between Marcuse and Vette. Observe that these agreements were dated March 28, 1917, or five days before the execution of the documents in Colonel Foreman's office. The agreement discloses that Marcuse had requested Vette to become a special partner in the firm of Marcuse & Co., and that Vette was willing to do so. In this contract, Marcuse agreed that he would at any time after the expiration of one year from the date of the execution of the special partnership contract, if Vette so requested, etc., purchase Vette's interest in that business upon the terms set forth in this contract, and would indemnify Vette against any and all liability on account of any of the firm obligations. In other words it was agreed that if Vette sold his interest as special partner in the business of Marcuse & Co., Marcuse would protect Vette against liability on account of any firm obligations.

This agreement provided further that if, after the termination of the copartnership known as Marcuse & Co., Marcuse should continue in the brokerage business, Vette could, upon contributing to the capital of that firm, become interested in the business to the extent provided in this agreement. *It was not an obligation that Vette would, but merely that he could, if he so desired.*

Both of these agreements related to the partnership then in contemplation, and which led to the signing of the documents in Foreman's office on April 2nd following, which were later abandoned, and both of these agreements had been canceled. They have no place in this case and are wholly immaterial for any purpose. The court should have sustained the objection to their introduction.

Hecht Exhibits 4 and 5 bearing date June 30, 1917 (Rec., 667-670) were executed with reference to Exhibits A and B. Hecht Exhibit 4 was an agreement between Marcuse and Zuncker, and Hecht Exhibit 5 between Marcuse and Vette. Both are alike except as to the amount of money stated in them. We comment on the Zuncker agreement. This agreement recites in its preamble that pursuant to an agreement (Exhibit A) a special partnership had been entered into between Marcuse, Morris, Hecht and Finn, and that Hecht and Finn had executed their certain declaration of trust (Exhibit B), etc.; that Marcuse had requested Zuncker to pay $25,000 into said trust fund and accept certificates of trust therefor which Zuncker had agreed to do. It was then provided that at any time after April 2, 1918, upon Zuncker's request Marcuse would purchase his trust certificate paying therefor the amount as provided in this agreement; that Marcuse would indemnify and save Zuncker harmless against any and all liability on account of any obligations of Marcuse & Co.; and that Marcuse agreed that if, after the termination of the business of the copartnership known as Marcuse & Co., he should continue in the brokerage business Zuncker might, at his option, contribute to the capital of that new business $25,000 as provided in this agreement. *There was no obligation on Zuncker's part to do so. The agreement merely gave him that right.*

What Hecht's Exhibits 2 and 3 do indicate is that Marcuse had difficulty in persuading Vette and Zuncker to become parties to the limited partnership agreement which was abandoned. Manifestly, in order to procure their consent he had to agree with them that if later they so desired he would purchase their interest as limited partners in the firm and protect them from any possible liability.

We have already pointed out that after the plan for a limited partnership with more than two limited partners was abandoned and Marcuse and Stein started out to organize a limited partnership with but two limited partners, Marcuse talked to Zuncker, and Zuncker refused to have anything to do as a limited partner with the new firm which Marcuse and Stein were then endeavoring to organize, and that in this regard he represented Vette also. (Rec., 547.) Later came the question whether Zuncker and Vette would become certificate holders under Exhibit B. Manifestly, Marcuse had difficulty in persuading them to do this and in order to get them to become certificate holders under Exhibit B had to agree with them as he did by Hecht's Exhibits 3 and 4 that if they so desired he would purchase their certificates from them, and, if he did, protect them from any possible liability, etc.

We do not think these exhibits are open to the inference or construction which petitioners seek to draw from them or place upon them. Marcuse by the management of the business of Marcuse & Co. might demonstrate not only that the business was a safe business but a profitable one. At the expiration of the term for which the partnership first was to be organized and later was organized it might have become apparent that a brokerage business conducted by Marcuse was a safe and profitable business in which to invest funds, and in the event that Marcuse should organize another firm and therefore continue the business, these exhibits were designed to give Vette and Zuncker the right to invest in that business if they saw fit to do so. There was no obligation on them to do so.

These documents we think were wholly immaterial and should not have been admitted in evidence. We cannot see how they have any bearing or throw any light upon the points in controversy in this case.

B.

IF THE HECHT-FINN TRUST MADE THE CERTIFICATE HOLDERS PARTNERS WITH HECHT AND FINN (WHICH IS DENIED) SUCH PARTNERSHIP IS A SUBPARTNERSHIP AND SUBPARTNERS ARE NOT LIABLE AS PARTNERS.

If Exhibit B makes Hecht and Finn, as trustees, or certificate holders, partners with these respondents (which is denied), such partnership is between themselves alone and is in law a *subpartnership*. As subpartners these respondents are not in law members of Marcuse & Co.

Hecht and Finn, as trustees, under the terms of Exhibit B were not partners with the certificate holders. If, however, they were partners with certificate holders, what was their partnership fund? What were they partners in? In only *two things*: (a) The income and profits which would accrue to Hecht and Finn, as special partners (under Exhibit A) of Marcuse & Co., but only after such income and profits had been paid over by Marcuse & Co.; and (b) after dissolution, and all debts paid, the residue of the corpus which would be distributable to Hecht and Finn as special partners, *but only after* it had been paid over to Chicago Title and Trust Company.

The certificate holders had no interest, legal or equitable, in the assets or property of Marcuse & Co. (Ex. B, Sec. 6, Rec. 29.)

The money (and the only money) they were to receive was a share in the profits, or liquidated proceeds, receivable by Hecht and Finn, if (and only if) and after (and only after) such profits and proceeds had been *severed and segregated* from the property and custody of Mar-

cuse & Co. and paid over to Chicago Title & Trust Company. (Ex. B, Secs. 1, 2, 4, 6, Rec. 26, 27, 28, 29.)

When profits distributed by Marcuse & Co. reached the trust company, they were distributed by that company *not as profits but as a part of the trust fund.* (Ex. B, Secs. 1, 2, 4, 6.)

If, therefore, Exhibit B created a partnership between Hecht and Finn, and the certificate holders (which it did not), it was a subpartnership, and its members other than Hecht and Finn were not members of the firm of Marcuse & Co. or liable to its creditors, and Hecht and Finn were members of Marcuse & Co. not by reason of the Trust Agreement, but by reason of the Limited Partnership Agreement, to which none of these respondents were parties. Nothing in the law is better settled.

We quote leading text works on this principle:

Mechem's Elements of Partnership (2nd Ed. 1920), p. 52:

> "One or more of the partners of a firm may agree with a third person to share with him the interest of such partner or partners in the firm. Such a relationship is frequently called a subpartnership, and the third person so associating with the partner is often called a subpartner. 'A subpartnership,' says Mr. Justice Lindley, 'is, as it were, a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate.' The term 'subpartnership,' however, is a misnomer. The subpartnership carries on no business; the subpartner has none of the authority of a partner; he does not thereby become a partner in the original firm, he is not liable as such to creditors of the original firm, and he has no right of accounting as a partner against the original firm, but only against such members of it as united with him to form the subpartnership."

Bates Law of Partnerships, Vol. 1, pp. 168, 169, 170:

"A partner has a right to contract with a stranger on his own account, whereby the latter shall participate in his share of the profits and bear part of his losses. This wheel within a wheel is called for convenience a subpartnership, and constitutes the parties to it partners, and the third person is called a subpartner.

But as between the original partners the subpartner is not a member of the firm, but is only a partner of the one with whom he contracted. The right of *delectus personarum* prevents any person being made a partner of others without their consent, and forcing upon the rest an associate whom they had not selected. * * *

Nor does the mere knowledge, recognition and approval of the other partners of the arrangement between one of their number and a subpartner constitute the latter a member of the firm. * * *

Nor is such subpartner liable as partner to creditors of the firm, for he does not participate in the profits as principal, and has no community in them or lien before division to compel an accounting and distribution, nor a control over the operations of the firm, but his claim is merely a demand against the partner with whom he contracted. The principles of *Cox* v. *Hickman,* etc., Secs. 19-23, are conclusive upon this."

Parsons on Partnership, p. 33:

"Subpartner is the name often given to one with whom a partner shares his profits by agreement. Since, however, such a person is neither in fact a partner nor is he held liable as a partner, the term subpartner is misleading and not to be commended."

Cyclopedia of Law and Procedure, Vol. 30, pp. 381, 382:

"When a partner contracts with a person outside the firm to share with such person the profits and losses of his own interest in the firm, their relationship is often described as that of subpartnership. This, however, does not seem to be an accurate or desirable term; for such joint owners are not engaged in carrying on a business in common with a view of profit. Their actual relations are

generally those of creditor and debtor. It follows from the doctrine already stated that a partnership cannot be created between persons without their voluntary assent that a subpartner is not a member of the firm. Even the knowledge of one partner that his copartner has agreed to share his share with an outsider and his assent to such arrangement, does not introduce such outsider into the firm. *The fact that a subpartner takes a portion of the firm's profits has never been held enough to render him liable for the firm's debts;* for he has no joint proprietorship with all the partners in the profits before division, he has no right to an account as a partner, and he has no lien on the partnership assets to secure his claim to a 'share of a share' of the profits. His claim is against the individual partner who has contracted with him. So his liability is limited to such individual, and to that individual's separate creditors; unless indeed he has held himself out as a member of the firm, and induced persons to give credit to the firm on the strength of such holding out. While a subpartner has no right to an account as a partner, he may be entitled to maintain an equity action against all the members of the firm, in order to have determined his share in the interest of the partner who contracted with him. But such an action does not operate to force plaintiff into the firm as a member thereof. On the other hand it subjects plaintiff to all the defenses, set-offs, and counterclaims available against the partner whose interest he seeks to share."

And in the same volume, at page 396, it is said that:

"One who is not in fact a member of a firm and who has not held himself out as a member does not become liable for the firm's debts, by reason of a contract which entitled him to divide with one of the partners the latter's share of the firm's profits."

American State Reports, Vol. 115, p. 400, 430, note:

"Status of subpartners with respect to the main partnership—

> The fact that one is a subpartner—that is, a person who has an agreement with a member of a partnership to share with such member his proportion of the partnership—does not make him a member of the partnership."

A long list of cases is cited in this note in support of this proposition, with no reference to any case dissenting therefrom.

Ruling Case Law, Vol. 20, 1073, 1074:

> "A partner may make an agreement with a third person for a division of the profits coming to him from the partnership enterprise, and, if the character of the agreement is such as to disclose the essentials necessary to a partnership, a subpartnership is thereby formed between the partner and the third person; but such person does not become a member of the first partnership nor is he liable for its debts. How profits between two members of a subpartnership are to be divided is immaterial, and the mere fact that the one who is not a partner of the original partnership is to receive the entire profits of the business will not prevent the formation of a subpartnership. Whether the relationship between a partner and a stranger created by giving the latter a share of the profits is termed a subpartnership or not, the rule is well established that an agreement between a member of a partnership and a third person, *with the knowledge and assent* of the other partners, that the third person should share in a certain proportion, in the profits and losses of the contracting partner in the partnership business, does not make such third person a partner or liable for the partnership debts."

The following cases are to the same effect:

Burnett v. *Snyder*, 76 N. Y. 344.

Burnett v. *Snyder*, 81 N. Y. 550; 37 Am. Rep. 527, 531.

Bybee v. *Hawkett* (C. C. A. 6), 12 Fed. 649.

Bank v. *Morris*, 43 Legal Intelligence (Pa.) 56.

Rockafellow v. *Miller*, 107 N. Y. 507.

O'Connor v. *Sherley,* 107 Ky. 70; 52 S. W. 1056.
Setzer v. *Beale,* 19 W. Va. 274, 287, 288.
Crehan v. *Megargel* (N. Y. App. Div.) 192 N. Y. S. 290, 299.
Meyer v. *Krohn,* 114 Ill. 574, 581.

The fact that Marcuse and Morris, general partners, in writing, on Exhibit B, consented to this trust arrangement in its application to the firm of Marcuse & Co. in nowise changes this legal situation. The same fact was present in the following cases, in which the arrangement was held to be a subpartnership:

Burnett v. *Snyder,* 81 N. Y. 550, 553, 554.
Rockafellow v. *Miller et al.,* 107 N. Y. 507, 510.

See, also, the textbooks:

Bates, Law of Partnership, p. 169.
Cyc. of Law and Procedure, Vol. 30, p. 382.
Ruling Case Law, Vol. 20, p. 1074.

The fact that the partnership was created by Exhibit A, and the trust by Exhibit B, at substantially the same time, and that the purpose of Hecht and Finn in executing Exhibit B was to raise money to put into the capital of Marcuse & Co. as special partners, does not in any way change this legal situation. That element of fact was present in the following cases, in which there was held to be a subpartnership:

Burnett v. *Snyder,* 76 N. Y. 344, 348, 349.
Burnett v. *Snyder,* 81 N. Y. 440, 553.
O'Connor v. *Sherley,* 52 S. W. (Ky) 1056.

If, therefore, we should concede (which we do not) (1) that Exhibit B created a *partnership* between Hecht and Finn, and the other certificate holders, and (2) that Hecht and Finn were *general and unlimited partners*

of Marcuse & Co.; yet, on the plain and undisputed principle of law here set forth, the certificate holders would be "*subpartners*" among themselves, and not *partners* of Marcuse & Co., and not liable for the debts of that firm.

C.

THE TWO STUDEBAKERS WERE NOT EVEN CERTIFICATE HOLDERS UNDER EXHIBIT B, AND CANNOT BE HELD LIABLE AS PARTNERS ON ~~IN~~ ANY THEORY.

Prior to April 2, 1917 (in March), Marcuse had a talk with Clement Studebaker, Jr., in Boston (Rec., 443, 502), about a firm he (Marcuse) was then endeavoring to organize. Petitioners' (Brief, pp. 86, 87), to sustain their contention that the Studebakers should be held liable as partners of Marcuse & Co., refer to this conversation and also to another conversation had between Marcuse and Scott Brown. The conversation with Clement Studebaker, Jr., was, of course, prior to the April 2, 1917, arrangement and could have no reference to the arrangement finally worked out and evidenced by the documents signed on June 30, 1917. The quoted statement (Petitioner's brief, p. 33) as to what Mr. Brown said to Marcuse with reference to Hecht was made with direct reference to the position which Hecht was to occupy under the Trust Agreement. Neither conversation has the slightest tendency to sustain petitioners' contention, but both are in absolute harmony and perfectly consistent with Exhibits A and B, the documents finally executed. For a detailed analysis of the testimony and the record with reference to the Studebakers and with reference to the conversations just referred to, see the appendix to this brief, page xcii.

The evidence establishes beyond the realm of dispute the following facts:

(a) Neither Marcuse, nor anyone for him, had a word of communication with George M. Studebaker about the organization of Marcuse & Co. (Rec., 445.) And there is absolutely no evidence that Clement Studebaker, Jr., had any authority to speak for George.

(b) Scott Brown had no communication of any kind with George M. Studebaker relative to the matter until after Hoffman had signed the limited partnership document in Foreman's office on April 2, 1917, and then he only reported to him what had been done. (Rec., 534, 535.)

(c) The only talk that Marcus had with Clement Studebaker, Jr., with reference to his proposed firm was had sometime prior to April 2, 1917, and this is also true of his talk with Scott Brown in which Brown spoke of making $50,000 available for that purpose, and both of these talks, of course, related to what Marcuse was then endeavoring to work out and which resulted in the signing of the limited partnership documents in Foreman's office on April 2, 1917, by the terms of which Hoffman was to contribute $50,000 to the capital of that firm. (Rec., 229.)

(d) This proposed partnership was subsequently abandoned and the limited partnership document signed on that date never took effect.

(e) The record does not contain the slightest indication that Marcuse or Morris, or anyone on their behalf, or anyone else, ever had a word of communication with either George M. Studebaker or Clement Studebaker, Jr., from that time on until after the firm of Marcuse & Co. composed of Marcuse, Morris, Hecht and Finn had been organized, the trust agreement, Exhibit

B, had been executed and Studebaker Bros. Trust had purchased a $50,000 certificate.

The two Studebakers are interested in Studebaker Bros. Trust, likewise Scott Brown. (Rec., 576.) The written instrument creating Studebaker Bros. Trust is in evidence. (Rec., 576.) If, therefore, George M. Studebaker and Clement Studebaker, Jr., became members of the firm of Marcuse & Co. it is because, *and only because,* Studebaker Bros. Trust through Hoffman acquired and became the owner of a $50,000 certificate under the Hecht-Finn Trust created by Exhibit B. Neither George M. Studebaker nor Clement Studebaker, Jr., ever directly or indirectly invested a dollar in Marcuse & Co., nor did they ever directly or indirectly receive a dollar in the way of profits *as profits or otherwise* from that firm.

In order to establish any connection between George M. Studebaker and Clement Studebaker, Jr., and the profits or dividends of Marcuse & Co. this road must be traveled: Upon a declaration of dividends by Marcuse & Co., the amounts due to Hecht and Finn under Exhibit A were paid to Chicago Title & Trust Company according to the terms of Exhibit B, and thus ceased to be dividends or profits and became a part of the trust fund to be distributed by Chicago Title & Trust Company to the certificate holders under Exhibit B, whereupon Chicago Title & Trust Company in the distribution of this trust fund paid to Studebaker Bros. Trust its proportionate share of the distribution made on the certificate which that trust held, and the amount so paid thus became a part of the trust fund provided for under the Studebaker Bros. Trust agreement, and, in due course, as distributions were made out of the Studebaker Bros. Trust fund George M. Studebaker and Clement Studebaker, Jr., as beneficiaries under the Studebaker Bros.

Trust agreement received their proportionate share of such distributions.

Neither of the Studebakers ever purchased or owned a trust certificate under Exhibit B. Studebaker Bros. Trust is a fund. The LEGAL TITLE to that fund was and is in Chicago Title & Trust Company, and in no one else. (Hecht Ex. 1, Sec. 11, Rec., 589.)

The Studebakers are not the sole beneficiaries under this trust. (Rec., 594, 576, 585, 586, 587.) The instrument plainly contemplates other beneficiaries. The written directions are not in evidence and, therefore, it does not appear definitely WHO certain of the other beneficiaries are, or whether they are two or ten in number. In any event the two Studebakers as individuals had no title to the "fund."

Hoffman in delivering the check for $50,000 in payment for a trust certificate was acting as the representative of Studebaker Bros. Trust. (Rec., 642.)

It does not appear that either of the Studebakers ever heard of the purchase by Studebaker Bros. Trust of a trust certificate, until after such purchase was made.

We feel that plain speaking on behalf of George M. Studebaker and Clement Studebaker, Jr., will be satisfied with nothing less than for us to say that the contention that these two men were partners in the firm of Marcuse & Co. and liable as such for the debts and obligations of that firm is nothing less than absurd.

Petitioners suggest (Brief, p. 90) that Studebaker Bros. Trust was joint venture, which they say was nothing but a partnership, and they cite two Illinois cases which we here very briefly analyze to show they are not in point.

Morse v. *Richmond*, 97 Ill. 303.

In that case several parties purchased real estate. Each contributed to the fund. The property was to be improved and sold. For convenience title was placed in one of them as trustee and the trust instrument gave him the power to manage, improve, sell, etc. It provided that the proceeds or profits should be divided according to their respective shares. As money was needed from time to time for expenses each party to the transaction put up his share. They were joint owners in the business, and held to be a partnership.

People v. *Brander,* 244 Ill. 26.

In this case an indictment against Brander charged him as agent and clerk of "American Express Company, an association," with embezzlement, larceny and the sale of stolen property. The court held that the indictment was bad. In the course of the opinion the court said that a private joint stock company is a partnership and nothing more. The court treated the American Express Company as an ordinary private joint stock company and apparently assumed that the powers and authority of the stockholders under the articles of association were such as to create a partnership.

THE QUESTION OF CIRCUMVENTION.

Petitioners contend that the arrangements evidenced by Exhibits A and B were designed and intended by the parties only to circumvent the rules of the New York Stock Exchange; that in fact all of the parties intended that the status to be occupied by them with reference to each other and to Marcuse & Co. should be the same status they would have occupied if the documents left in escrow with Colonel Foreman had become effective, and they argue that the trial court so held and upon sufficient evidence; that this is a controverted question of

fact settled by the trial court against respondents and not one for consideration in this court. A consideration of the record will show the court that petitioners' contention is wholly without merit.

After the first limited partnership agreement had been executed on April 2, 1917, and nine duplicate originals thereof left in escrow with Colonel Foreman as heretofore pointed out, Marcuse went to New York to make arrrangements to permit the proposed firm to transact business on the New York Stock Exchange, etc. (Rec., 454, 498.)

He testified in effect that he there ascertained that the partnership, as contemplated by this document signed on April 2, 1917, would not be permitted on the New York Stock Exchange. (Rec., 498, 499.) Following his return to Chicago, he received the telegram from the secretary of that exchange, which counsel for the petitioning and intervening creditors introduced in evidence as Petitioners' Exhibit 15, and which we here reproduce. (Rec., 262.) This telegram reads:

> "The committee on commissions probably would not object to a firm having two special partners if they were not engaged in any other business and were otherwise passed upon favorably by said committee."

Probably the word "commissions" was intended to be "admissions."

Two things are clearly indicated by this telegram:

(a) So far as the New York Stock Exchange was concerned, not more than two special partners were permissible.

(b) The special partners must not be engaged in any other business.

But,

(a) The firm of Marcuse & Co., as contemplated by the documents signed on April 2, 1917, was to have six special partners:

(b) Four of the six were actively engaged in other businesses. (Rec., 330, 331.)

Marcuse clearly recognized that the plan for the firm as provided for in the documents signed on April 2, 1917, could not be carried out. He so indicated to his lawyer, Mr. Sidney Stein, attorney for himself and Morris through all of these negotiations and transactions, (Rec., 499), and everybody else concerned were promptly notified to that effect.

Marcuse testified on cross-examination that as a result of his trip to New York he knew when he came back that the contemplated partnership, evidenced by the documents which had been left in the possession of Colonel Foreman, could not go into effect and *that that plan would have to be abandoned.* He testified specifically, directly and unequivocally that he so told Vette, Zuncker, Regensteiner, Hoffman, Scott Brown, Hecht and Finn. (Rec., 498, 499.)

It appears from the evidence without the possibility of dispute or doubt that:

(a) Marcuse and his lawyer, Stein (attorney for Marcuse and Morris) fully understood that the plan as contemplated by the documents signed in Colonel Foreman's office *had to be abandoned*, and the reasons for it; (Rec., 498, 499.)

(b) Marcuse so notified Hecht, Finn, Vette, Zuncker, Hoffman, Scott Brown and Regensteiner; (Rec., 498, 499.)

(c) Stein so notified Colonel Buckingham, (Rec., 551, 552, 575), the partner of Hoffman, and counsel for Scott Brown, Studebaker Bros. Trust and the two Studebakers. Scott Brown also told Buckingham after he had gotten the information from Marcuse. Stein likewise notified Colonel Foreman, (Rec., 547, 549), who was the attorney for Vette and Zuncker, and Foreman, in turn, so notified Zuncker, (Rec., 547), who was the one with whom he dealt chiefly in connection with both Vette and Zuncker in these transactions. (Rec., 547, 619.)

(d) Stein also notified his friend and client, Finn, and Finn testified that he thereafter assumed that that contemplated firm was abandoned. (Rec., 325, 326.)

(e) Zuncker testified that he knew that deal was off, (Rec., 392), and that the original arrangement was "cancelled altogether." (Rec., 379.)

(f) Regensteiner knew it. (Rec., 498, 428?)

(g) Hoffman knew it. (Rec., 499.)

(h) Scott Brown knew it. (Rec., 499, 552.)

(i) Hecht, who was too ill to come into court when this matter was on hearing, and who has since died, knew it, for such is the positive and uncontradicted testimony of Marcuse. (Rec., 499.)

If further notice to Colonel Buckingham was necessary he had it when Marcuse and Stein subsequently came into his office to persuade him, if they could, to have his clients come into a new arrangement which Marcuse and his attorney, Stein, were then desirous of working out, (Rec., 552), and Hoffman had it for he was present at that conference. (Rec., 553, 552, 637.)

Colonel Foreman, with whom the documents signed April 2, 1917, were left in escrow, went into the service sometime in May, 1917, and was not active in his office after that (although in and out occasionally before leaving Chicago) until he returned from the war (Rec., 547, 548), and, for that reason, his partner, Robertson, looked after the interests of Vette and Zuncker. (Rec., 548, 621.) Although the documents signed in Colonel Foreman's office on April 2, 1917, were abandoned, these documents and the escrow letters rested in Foreman's vault until in the early part of July, 1917, when they were formally canceled by the destruction of the signatures thereto by Sidney Stein and Robertson. (Rec., 619, 620, 634, 635.)

Marcuse testified that he knew the circumstances under which the signatures were partially torn off, although he did not know who tore them off. (Rec., 455.)

Petitioner seeks to make a point (Brief, p. 41) of the fact that the signatures to the documents were not destroyed until in July. (Rec., 620.) This is of no consequence. That the contemplated firm had been abandoned is beyond dispute.

After the receipt of the telegram of May 8, 1917, Marcuse and Stein endeavored to organize another partnership which would meet the requirements of the New York Stock Exchange. (Rec., 552, 553, 637.)

After they were advised that the arrangement of April 2, 1917, would have to be abandoned the attitude of the persons named as special partners in that document (other than Hecht and Finn) and of their counsel underwent a change and Buckingham, who had been away when the original arrangement was made and who had had no part in it but learned of it only after the execution of the documents in Colonel Foreman's office, was opposed to that arrangement and when Marcuse and Stein interviewed him later in their effort to organize a new firm with only two limited partners he stated to them that neither Hoffman nor any one representing his clients would become a partner, general or special, in any firm. (Rec., 553, 621, 637.) Zuncker when approached by Marcuse with reference to the new firm told Marcuse that he would have nothing to do with it (Rec., 393), and, as pointed out, Zuncker also spoke for Vette. (Rec., 547, 619.) Marcuse testified that he worked out a plan on his way back from New York (Rec., 500), but if he did it was not the plan finally consummated for he testified that the idea of a trust agreement did not come from his mind. (Rec., 500.) Early in May, 1917, Stein advised Buckingham that the original partnership arrangement had "fallen down" (Rec., 552, 553, 599), and it was on June 5, 1917, nearly a month after the receipt of the telegram in question when Marcuse and Stein met

Buckingham, Brown and Hoffman at Buckingham's office (Rec., 552, 553, 637) and endeavored to persuade Buckingham to have his clients become limited partners in the proposed new firm which Marcuse and Stein were then endeavoring to organize.

Buckingham's refusal; his insistence that no client of his would become a partner, general or limited, in that firm; that if any money was invested by any client of his it would be by Studebaker Bros Trust; the pains that were taken in the preparation of Exhibit B, etc., have been pointed out in another part of this brief (pp. 5, 6) and will not be repeated here. Hecht and Finn were persuaded to become limited partners by Marcuse, Stein and Mayer. (Rec., 267, 328, 331, 465.) These respondents had nothing to do with it. Exhibit B as finolly executed was the product of the minds of Buckingham, Hoffman and Robertson and they were the ones who inserted Section 6 therein. (See this brief, pp. 6, 7.) Every effort was made which could be made by careful lawyers who were determined that their clients should not assume a partnership relation with Marcuse & Co. but should be wholly removed therefrom to accomplish that result and no one can read Exhibit B and draw any other conclusion. The unsuccessful efforts which Marcuse and Stein made to induce Buckingham to have his clients become limited partners and to induce Zuncker, and, through him, Vette to become limited partners, before Marcuse, Stein and Mayer succeeded in persuading Hecht and Finn to become limited partners in their proposed new firm, led to conversations and conferences between various parties all taking place prior to June 30, 1917, upon which date Exhibits A and B, which evidenced the arrangement as finally consummated, were executed, and it is with this in mind that we urged in the trial court

and have heretofore pointed out and now again urge, that evidence as to these matters antedating the execution of Exhibits A and B was immaterial.

The arrangement as finally made was not what Marcuse and Stein would have had it, but so far as these respondents were concerned, Marcuse and Stein yielded to the only arrangement which Vette, Zuncker and Regensteiner, through their counsel, and which Buckingham, representing the Studebaker Bros. Trust, would have anything to do with.

As so well expressed by the Supreme Court of Pennsylvania in, *In Re Haines & Co's. Estate,* 176 Pa. 354; 35 Atl. 237, p. 239:

> "What then do we have? A proposition made and objected to; an informal discussion prolonged for a month or more; then a yielding of objections and a consent; but what was to be done 'not exactly or succinctly stated'; and finally the parties, with the aid of counsel, putting their agreement formally into writing. It would be difficult to imagine a case calling more strictly for the enforcement of the rule that all prior negotiations are merged in the writing which is to be the sole evidence of the intentions of the parties."

It is into the field which lies beyond the execution of Exhibits A and B that petitioners go for their excerpts from the record which they rely upon to justify their contention that Exhibits A and B do not represent the real intention of the parties and we now desire to show the court how unfairly they have used the record and that the evidence in this record when fairly read does not bear out or justify their contention.

We have already made the point, and cited authorities which abundantly support it (see this brief, pp. 76, 78), that all of the conversations and negotiations which antedated the execution of Exhibits A and B (June 30, 1917)

were merged in these written instruments and inadmissible. The legal effect of these documents is not changed by anything which may have taken place in the negotiations antedating their execution during which time the plan finally evidenced by Exhibits A and B was in the making, nor by any expression from any witness as to what may have been his understanding as to the legal status of the parties. We feel, therefore, that the excerpts from the record which petitioners have used on pages 32 to 38 inclusive of their brief should and will receive but little attention from this court because they fall under the condemnation of the rule to which we have adverted and we do not feel justified in lengthening this brief, already too long, by a detailed analysis of the evidence from which petitioners have sifted the excerpts, which they have quoted without regard to their context.

The excerpts to which we refer, however, have been most unfairly used. Disregarding context they have been put together in a manner to convey an entirely erroneous impression. Petitioners thereby have sought to justify their contention that Exhibits A and B were not intended by the parties to mean what they say, but that despite these exhibits the parties intended that all of them except Marcuse and Morris should be limited partners.

An analysis of the testimony in connection with these various excerpts proves to a demonstration that there is no justification in the record for petitioners' contention in this regard and, therefore, anticipating the possibility that the court may desire to make such an examination, we have made such an analysis to show what it was the witnesses were really saying and what they meant to say by the statements contained in these excerpts and this analysis with comments in connection therewith the court will find in our appendix.

As to the first excerpt (Brief, p. 32; Rec., 457) see appendix, page lviii.

As to the second excerpt (Brief, p. 32; Rec., 458) see appendix, page lx.

As to the third excerpt (Brief, p. 32; Rec., 460) see appendix, page lxii.

As to the first excerpt on page 33 of their brief (Rec., 462), see appendix, page lxvii.

As to the excerpt at the bottom of their brief, p. 33 (Rec., 470, 471) see appendix, page lxx.

As to the reference to Scott Brown at the bottom of petitioners' brief, page 33 (Rec., 467), see appendix, page xcii.

As to the excerpt from the trial court's comments (Brief, p. 34; Rec., 471), see appendix page lxii.

As to the except from the testimony in petitioners' brief, p. 34 (Rec., 471), see appendix, page lxxiv.

As to the excerpt from the testimony of Finn in petitioners' brief, p. 35 (Rec., 257), see appendix, page lxxvi.

Here is a typical instance of the unfairness to which we refer. Finn was testifying to a conversation with Stein, Mayer and Marcuse. He testified that none of the other parties were present. The trial court expressly held that this testimony of Finn was not evidence as against any of these respondents (Rec., 257), but petitioners do not point that fact out in their brief, but use this statement by Finn against all respondents.

As to the excerpts at the bottom of page 35 and the top of page 36 of petitioners' brief (Rec., 688), see appendix, page lxxvii.

As to the excerpt from the testimony of Regensteiner (Brief, p. 36; Rec., 428, 429), see appendix, page lxxviii.

As to the excerpts from the testimony of Hoffman (Brief, p. 37; Rec., 674, 675, 683, 687), see appendix, page lxxxii.

When these excerpts from the record are read in connection with their context so that what the witnesses really testified to is understood, they utterly fail to sustain petitioners' contention. Written documents so carefully prepared and solemnly entered into as Exhibits A and B cannot thus be cast aside. Every important transaction involves preceding negotiations. Every change of plan involves discussions between the parties. With the passing of time the recollections and understandings of men may vary and people reduce their agreements to writing and thus put them in the form of written contracts to set at rest the things they finally agree upon and these solemn agreements cannot be cast aside in the manner in which petitioners seek to cast them aside.

The Trial Court's Findings.

Petitioners state (Brief, p. 12) that after the parties learned of the position taken by the New York Stock Exchange there was no thought of abandoning the proposed limited partnership as evidenced by the documents left in escrow with Colonel Foreman, but that they determined to "circumvent or evade" the rules of that stock exchange and that it was determined that the partnership should proceed just as originally planned with Hecht and Finn appearing as special partners and representing all of the respondents.

In other words, this is but a reiteration of petitioners' argument that Exhibits A and B did not indicate the real agreement between the parties but that this plan was designed only to circumvent or evade the rules of

the New York Stock Exchange and the parties intended that all of them except Marcuse and Morris should be in fact limited partners.

And, they argue further that the trial court so held (Brief, pp. 44, 45) and that this holding involved a controverted question of fact which cannot be considered by this court.

As to the question of circumventing or evading the rules of the New York Stock Exchange we have simply this to say: Marcuse & Co. as originally contemplated would have had more than two limited partners, some of whom would have been engaged in other lines of business. This the New York Stock Exchange would not permit. If Marcuse organized a limited partnership and succeeded in having that partnership admitted to the New York Stock Exchange it must be a partnership with not to exceed two limited partners neither of whom were engaged in other lines of business. Marcuse thereupon undertook to organize such a firm so that his firm, when organized, might be admitted to membership in the New York Stock Exchange, and to that extent and that extent only may it be said that he designed and intended to "circumvent or evade" the so-called rules of the stock exchange. *As a matter of fact it was neither circumvention or evasion, but compliance.*

The New York Stock Exchange was concerned with two things,

(a) That the limited partnership should have not to exceed two limited partners, and

(b) That neither of these partners should be engaged in any other business.

The stock exchange was not concerned with the manner in which the limited partners procured the funds

which they contributed to the capital of the firm and it is not complaining and has never complained.

What did the trial court find and what is the character of the finding?

The announcement of the court's conclusion is in the record. (Rec., 689.) The court said:

> "The conclusion is that the so-called 'special partners' are all general partners; that these so-called 'special partners,' selected,—all of them selected Hecht and Finn as the agents for the operation of the special partnership, by and through Hecht and Finn; that Hecht and Finn, in fact were Hecht and Finn, Vette,—what is that other name,—Siedenstricker?
>
> Mr. Gesas: Regensteiner.
>
> The Court (continuing): Regensteiner, the Hecht-Finn Trust, the Studebaker Trust, as Clement and George Studebaker; that that is what Hecht-Finn were. They were all of these people; and that under the laws of the State of Illinois that thing was not a special partnership, but it was, by the law of the State of Illinois, a general,—member of a general partnership, by reason of the failure to comply with the Illinois statute specifying the steps, and prescribing the route to be taken to constitute a limited partnership, which, as I have announced before, it was my view, had to be obeyed to accomplish that end, but which in this case was not done in any essential particular. Now, that is my conclusion."

If the trial court meant by the statement that all of the parties selected Hecht and Finn as the agents for the operation of the special partnership, that these respondents or any of them had anything to do with inducing or persuading either Hecht or Finn to become a limited partner in this firm there is not a scintilla of evidence in the record to sustain such a statement. None of these respondents had anything to do with the selection of Hecht and Finn as the two limited partners.

This is established by the uncontradicted evidence in the record. (Rec., 267, 268, 327, 328, 331, 465, 500.)

Of course, certificate holders who agreed to acquire certificates under Exhibit B and who did acquire them acquiesced in the selection of Hecht and Finn as the two limited partners and consented to their acting in that capacity and as trustees under Exhibit B, and manifestly it was in that sense that the trial court was speaking when he spoke of Hecht and Finn having been selected.

Not a word about circumvention or evasion will be found in the trial court's remarks and not a suggestion that Exhibits A and B did not express the real agreement of the parties.

Suppose no evidence had been introduced as to anything (conversations, conferences, documents, etc.) occurring or having taken place prior to the execution of Exhibits A and B on June 30, 1917, but the evidence began, as we insist it should have begun, with the execution of Exhibits A and B.

Suppose it was contended as it was, that, by reason of Exhibit B, all of the certificate holders occupied the same relationship to the firm, as did Hecht and Finn, and that because the limited partnership certificate was not filed until July 2nd, their relationship was that of general partners. Suppose the trial court had reached the conclusion that this contention was sound and should be sustained. That conclusion could have been announced in precisely the language which the trial court did use.

Petitioners' contention that there was finally any other agreement or understanding than that evidenced by Exhibits A and B, *is utterly without support in this record.* With all the evidence considered there is no evidence which even tends to establish such a contention.

It falls for want of foundation to support it. If these respondents are liable as members of the firm of Marcuse & Co. it is because these written documents, together with the Studebaker Bros. Trust agreement, make them liable. Whether they do or not is a question of construction, hence, one of law.

If the trial court considered anything other than these instruments in reaching his conclusion he had no right to do so, nor did the Court of Appeals.

Let parties speculate as they will as to what the trial court *must have found* in order to reach the conclusion he announced. This court will lay out of consideration all of the evidence which is immaterial and, reducing this case to its ultimates, will find that the material facts are established without contradiction and that the documents upon which the order of the trial court must stand or fall, present, not questions of fact, but questions of law.

The Questions Involved Are Questions of Law.

Where the essential facts are not disputed and the contract is in writing the question of partnership is one of law.

Mackie-Clemens Fuel Co. v. *Brady* (1919), 208 S. W. 151, 152.

Ruling Case Law, Vol. 20, p. 849.

On a petition to review and revise the court may determine whether evidence was improperly admitted or excluded by the trial court. That is a "*question of law*" properly reviewable here.

In re Cole (C. C. A. 1st Cir.), 163 Fed. 180.

Goo[illegible] [illegible] *Kane* (C. C. A. 8th Cir.), 211 Fed. 956.

[illegible] v. *Taliaferro* (C. C. A. 4th Cir.), 202 Fed. 51.

On a petition to review and revise, the court may review the evidence for the purpose of determining *whether there was any substantial evidence to support the finding and action of the trial court.* Such a question is *purely a question of law.*

In re Kuhn Bros. (C. C. A. 7th Cir. 1916), 234 Fed. 277, 279, 280.

Freed v. *Central Trust Company of Illinois* (C. C. A. 7th Cir. 1914), 215 Fed. 873, 876.

Good v. *Kane* (C. C. A. 8th Cir.), 211 Fed. 956, 958.

Shea v. *Lewis* (C. C. A. 8th Cir.), 206 Fed. 877, 884.

In re Charles Knosher & Co. (C. C. A. 9th Cir.), 197 Fed. 136, 140.

In re Cole (C. C. A. 1st Cir.), 163 Fed. 180, 188.

In re Cole (C. C. A. 1st Cir.), 144 Fed. 392, 393.

Wilson v. *Continental Building & Loan Ass'n.* (C. C. A. 9th Cir.), 232 Fed. 824, 827.

In the case of *In re Kuhn Bros., supra* (234 Fed. 277, C. C. A. 7), the court, in a proceeding to review and revise, used the following language (pp. 279, 280):

> "In the consideration of this petition, we have assumed all controverted facts as determined in favor of the respondent. That a review thereof and of the uncontroverted facts to determine whether there is any substantial evidence to sustain the order, is a review as to a matter of law within the provisions of Sec. 24b of the Bankruptcy Act is well settled. *Good* v. *Kane*, 211 Fed. 956, 128 C. C. A. 454."

In the instant case there is no conflict of evidence as to any material fact. A question arises solely as to the legal effect of the relevant facts in evidence. Such a question is purely one of law.

In the case of *In re Charles Knosher & Co.* (C. C. A.

3rd Cir. 1912), 197 Fed. 136, the court said in its opinion (page 140):

> "The facts recited in these proceedings and material to the question at issue do not appear to be in doubt, or, at most, they are not a subject of controversy upon this petition for review. The only controversy is as to their legal import in the bankruptcy proceedings. Such questions may be reviewed upon a petition for revision."

Evidence may be reviewed on a petition to review and revise for any reason, for which evidence may be reviewed on a writ of error.

> *Shea* v. *Lewis* (C. C. A. 8th Cir.), 206 Fed. 877, 884.
>
> *In re Cole* (C. C. A. 1st Cir.), 144 Fed. 392, 393.

In so far as the Court of Appeals indicated, if it did intend to so indicate, that there was evidence in the record upon which the trial court might have found that Exhibits A and B did not represent the final agreement between the parties, but that the real intention of the parties was that the status or relationship of the parties to each other under the agreement as finally executed, that court was in error and such a statement, we submit, could only have been the result of a misapprehension of the full scope and effect of the testimony of the witnesses. We assert with all the confidence that can come from a painstaking consideration of the whole record that there is no evidence in this record from which any such conclusion can be fairly deduced.

The trial court made no formal findings of fact and entered an order simply holding that all respondents were partners of Marcuse & Co. The Circuit Court of Appeals reversed the trial court and held that none of respondents were partners. We contend with

the greatest confidence that the decision of the Circuit Court of Appeals was correct as to all respondents both as to the result and as to the grounds relied on. However, there were additional grounds upon which the Circuit Court of Apeals was bound to have reversed the trial court in holding that these respondents were partners, even though Hecht and Finn had been held liable. It seems hardly necessary to point out to this court that the rule announced in *McClurg* v. *Silliman*, 6 Wheaton, 598, 603, 5 L. Ed. 340, to the effect that the question on review is whether the judgment complained of is correct, not as to the ground announced by the court below, has never been changed in this court, but has been followed by this and other courts of last resort in literally hundreds of cases. (See very numerous cases cited in Vol. 4 Corpus Juris, 662-665.) The decision of the court was right, as also were the reasons which it gave for that decision. Even if those reasons were insufficient and Hecht and Finn were held liable, yet for other reasons pointed out in this brief, these respondents would not have been and could not be held, liable as partners of Marcuse & Co.

Petitioners ask that written documents formally executed be disregarded. They seek to enforce against Hecht and Finn, and through Hecht and Finn these respondents, the most harsh doctrine known to law. They would fasten upon them a partnership liability which they never intended to assume, and upon which no creditor ever relied. To serve their purpose they ignore entirely (as they must) the letter and spirit of the Uniform Partnership Acts and urge this court to read into the Uniform Partnership Act limitations and exceptions which would deprive parties of protection to which they

are otherwise clearly entitled. Petitioners are requesting the court to do an unconscionable thing and one that is at variance with principles of equity and justice.

Conclusion.

In conclusion we respectfully submit:

(1) By reason of the renunciation, etc., under Section 11 of the Limited Partnership Act none of these respondents can be held liable as general partners.

(2) None of the respondents intended to be general partners with Marcuse and Morris and under the final arrangement none of these respondents intended to be partners either general or limited with anyone, and, therefore, none of the parties except Marcuse and Morris were general partners as to each other, hence, under Section 7 (1) of the Uniform (general) Partnership Act not partners as to third parties.

Because of the foregoing, none of the respondents are liable to the creditors of Marcuse & Co.

(3) But, even if it should be held that Hecht and Finn are liable to such creditors none of these respondents are so liable because,

(a) Vette, Zuncker and Regensteiner assumed the relationship of *cestuis que trust* as certificate holders under Exhibit B only and not that of partners, general or limited, and the Studebakers are not even certificate holders and,

(b) If Exhibit B should be held to create a partnership between the certificate holders it could only be a subpartnership and as members of such subpartnership none of the certificate holders, other than Hecht and

Finn, were partners, general or limited, in the firm of Marcuse & Co. and Hecht and Finn as limited partners were such not because they were certificate holders or because of the provisions of Exhibit B, but because they were parties to Exhibit A.

We respectfully submit that the writ of certiorari should be dismissed for reasons pointed out at the beginning of this brief and if this be not done that the judgment of the Circuit Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

No. [redacted]59

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES, JOHN JANCA, I. FIEGEL, FRED MAYER, E. H. ALLEN, GEORGE B. GIFFORD AND HAROLD LACHMAN,

Petitioners,

vs.

HENRY VETTE, PETER M. ZUNCKER, THEODORE REGENSTEINER, CLEMENT STUDEBAKER, JR., GEORGE M. STUDEBAKER, FRANK A. HECHT AND CLARA K. HECHT, EXECUTORS OF THE WILL OF FRANK A. HECHT, AND JOSEPH M. FINN,

Respondents.

APPENDICES TO BRIEF OF RESPONDENTS VETTE, ZUNCKER, REGENSTEINER, CLEMENT STUDEBAKER, JR.. AND GEORGE M. STUDEBAKER, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Attorneys for Respondents, Henry Vette, Peter M. Zuncker and Theodore Regensteiner.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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APPENDICES.

APPENDIX A TO BRIEF OF RESPONDENTS VETTE, ZUNCKER, REGENSTEINER, CLEMENT STUDEBAKER, JR., AND GEORGE M. STUDEBAKER IN OPPOSITION TO PETITION FOR CERTIORARI.

(Italics ours.)

Explanatory Note as to the Uniform Limited Partnership Act.

"The business reason for the adoption of acts making provisions for limited or special partners, is that men in business often desire to secure capital from others. There are at least three classes of contracts which can be made with those from whom the capital is secured: One, the ordinary loan on interest; another, the loan where the lender, in lieu of interest, takes a share in the profits of the business; third, those cases in which the person advancing the capital secures, besides a share in the profits, some measure of control over the business.

At first, in the absence of statutes the courts, both in this country and in England, assumed that one who is interested in a business is bound by its obligations, carrying the application of this principle so far, that a contract where the only evidence of interest was a share in the profits made one who supposed himself a lender, and who was probably unknown to the creditors at the times they extended their credits, unlimitedly liable as a partner for the obligations of those actually conducting the business.

Later decisions have much modified the earlier cases. The lender who takes a share in the profits, except possibly in one or two of our jurisdictions, does not by reason of that fact, run a risk of being held as a partner. If, however, his contract falls within the third class mentioned, and he has any measure

of control over the business, he at once runs serious risk of being held liable for the debts of the business as a partner; the risk increasing as he increases the amount of his control.

The first Limited Partnership Act was adopted by New York in 1822; the other commercial states, during the ensuing thirty years, following her example. Most of the statutes follow the language of the New York statute with little material alteration. These statutes were adopted, and to a considerable degree interpreted by the courts, during that period when it was generally held that any interest in a business should make the person holding the interest liable for its obligations. As a result the courts usually assume in the interpretation of these statutes two principles as fundamental.

First. That a limited (or as he is also called, a special) partner is a partner in all respects like any other partner, except that to obtain the privilege of a limitation on his liability, he has conformed to the statutory requirements in respect to filing a certificate and refraining from participation in the conduct of the business.

Second. The limited partner, on any failure to follow the requirements in regard to the certificate or any participation in the conduct of his business, loses his privilege of limited liability and becomes, as far as those dealing with the business are concerned, in all respects a partner.

The courts in thus interpreting the statutes, although they made an American partnership with limited members something very different from the French Societe en Commandite from which the idea of the original statutes was derived, unquestionably carried out the intent of those responsible for their adoption. This is shown by the very wording of the statutes themselves. For instance, all the statutes require that all partners, limited and general, shall sign the certificate, and nearly all state that 'If any false statement be made in such certificate, all the persons interested in such partnership shall be lia-

ble for all the engagements thereof as general partners.'

The practical result of the spirit shown in the language and in the interpretation of existing statutes, coupled with the fact that a man may now lend money to a partnership and take a share of the profits in lieu of interest without running serious danger of becoming bound for partnership obligations, has, to a very great extent, deprived the existing statutory provisions for limited partners of any practical usefulness. Indeed, apparently their use is largely confined to associations in which those who conduct the business have not more than one limited partner.

One of the causes forcing business into the corporate form, in spite of the fact that the corporate form is ill suited to many business conditions, is the failure of the existing limited partnership acts to meet the desire of the owners of a business to secure necessary capital under the existing limited partnership form of business association.

The draft herewith submitted proceeds on the following assumptions:

First. No public policy requires a person who contributes to the capital of a business, acquires an interest in the profits and some degree of control over the conduct of the business, to become bound for the obligations of the business; provided creditors have no reason to believe at the times their credits were extended that such person was so bound.

Second. That persons in business should be able, while remaining themselves liable without limit for the obligations contracted in its conduct, to associate with themselves others who contribute to the capital and acquire rights of ownership, provided that such contributors do not compete with creditors for the assets of the partnership.

The attempt to carry out these ideas has led to the incorporation into the draft submitted of certain

features not found in, or differing from, existing limited partnership acts.

First. In the draft the person who contributes the capital, though in accordance with custom called a limited partner, is not in any sense a partner. He is, however, a member of the association. (See Sec. 1.)

Second. As limited partners are not partners securing limited liability by filing a certificate, the association is formed when substantial compliance, in good faith, is had with the requirements for a certificate. (See Sec. 2 (2).) This provision eliminates the difficulties which arise from the recognition of *de facto* associations, made necessary by the assumption that the association is not formed unless a strict compliance with the requirements of the act is had.

Third. The limited partner, not being in any sense a principal in the business, failure to comply with the requirements of the act in respect to the certificate, while it may result in the nonformation of the association, does not make him a partner or liable as such. The exact nature of his liability in such cases is set forth in Section 11.

Fourth. The limited partner, while not as such in any sense a partner, may become a partner as any person not a member of the association may become a partner; and, becoming a partner, may nevertheless retain his rights as limited partner; this last provision enabling the entire capital embraced in the business to be divided between the limited partners, all the general partners being also limited partners. (Sec. 12.)

Fifth. The limited partner is not debarred from loaning money or transacting other business with the partnership as any other nonmember; provided he does not, in respect to such transactions, accept from the partnership collateral security, or receive from any partner or the partnership any payment, conveyance, or release from liability, if at the time

the assets of the partnership are not sufficient to discharge its obligations to persons not general or limited partners. (Sec. 13.)

Sixth. The substitution of a person as limited partner in place of an existing limited partner, or the withdrawal of a limited partner, or the addition of new limited partners, does not necessarily dissolve the association (Secs. 8, 16 (2b)); no limited partner, however, can withdraw his contribution until all liabilities to creditors are paid. (Sec. 16 (1a).)

Seventh. As limited partners are not principals in transactions of the partnership, their liability, except for known false statements in the certificate (Sec. 7) is to the partnership, not to creditors of the partnership. (Sec. 17.) The general partners cannot, however, waive any liability of the limited partners to the prejudice of such creditors. (Sec. 17 (3).)

Respectfully submitted,

New York Legislative Drafting Association,

By Wm. Draper Lewis,
Draftsman."

APPENDIX B TO BRIEF OF RESPONDENTS VETTE, ZUNCKER, REGENSTEINER, CLEMENT STUDEBAKER, JR., AND GEORGE M. STUDEBAKER IN OPPOSITION TO PETITION FOR CERTIORARI.

THE UNIFORM LIMITED PARTNERSHIP ACT.

Vol. 65, Univ. of Pennsylvania Law Rev. 715.

On August 28th of last year the conference of Commissioners on Uniform State Laws, meeting in Chicago, adopted a limited partnership act and recommended it to the legislatures of the several states. The first state to adopt the act is Pennsylvania, the act becoming part of the law of the state on April 12th.

The committee of the conference charged with the duty of preparing the tentative drafts for submission to the conference, was the Committee on Commercial Law, the same committee which has been responsible for the acts on negotiable instruments, bills of lading, warehouse receipts, sales of goods and partnership. The writer, acting for the New York Drafting Association, served the Commercial Law Committee in the capacity of draftsman; that is, he was responsible for placing before the Committee the successive tentative drafts. But, as in the case of all other commercial acts recently issued by the Conference, the two successive drafts of this limited partnership act submitted to the Conference were the joint work of the Commercial Law Committee and the draftsman, every sentence being hammered out by round table discussions. The Conference, itself, composed as it is of lawyers appointed by the governors of the several states, devoted many hours of the 1915 and 1916 sessions to a full discussion of the general principles on which the act is based, and to the wording of each section.

The term "limited partnership" is sometimes employed to denote an association for carrying on business with a view to profit, in which, as in a corporation, the liability of all the members is limited to their contributions to the common fund, or to some multiple of such contributions, but in which the other legal incidents are not identical with those of an association organized under the general incorporation law of the state. These associations are not partnerships and are incorrectly designated as "limited partnerships." A true limited partnership is an association in which the liability of one or more, but not all of the members is limited to their contributions to the common fund; the liability of the other member or members for the debts of the association being unlimited. The members whose liability is limited are usually referred to as "limited" or "special partners," while those whose liability is unlimited are referred to as "general partners."

The first limited partnership act in the United States, was that adopted by the State of New York in 1822; the other commercial states during the ensuing thirty years followed her example, until to-day all the states, except New Mexico, have such an act. The various statutes follow the language of the New York statute with little material variation. The New York Act was modeled on the Societe en Commandite of the French Commercial Code. The Surrogate, Alexander W. Bradford, speaking in 1850, of the New York statute, in his opinion in *Ames v. Downing*,[1] gives an account of the origin of this French business association. He says:

> "The system of limited partnerships, which was introduced by statute into this state, and subsequently, very generally adopted in many other states of the Union, was borrowed from the French Code.

[1] 1 Bradf., p. 351 (N. Y. 1850).

> 3 Kent 36; Code de Commerce. It has existed in France from the time of the middle ages; mention being made of it in the most ancient commercial records and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar latinity of the middle ages it was styled *commenda*, and in Italy *accomenda*. In the statutes of Pisa and Florence, it is recognized as far back as the year 1160; also in the ordinance of Louis-le-Hutin, of 1315; the statutes of Marseilles, 1253; of Geneva of 1588. In the middle ages it was one of the most frequent combinations of trade and was the basis of the active and widely extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried along the shores of the Mediterranean; was known in Languedoc, Provence, and Lombardy, entered into most of the industrial occupations and pursuits of the age and even traveled under the protection of the arms of the Crusaders to the City of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride or caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises and reaping the profits of such lucrative pursuits without personal risks, and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation by means of this ingenious idea of that great commerce which made princes of the merchants, elevated the trading classes and brought the commons into position as an influential estate of the commonwealth."

The statement of Judge Bradford indicates the economic and business conditions which the limited partnership is intended to meet. In Venice in the middle ages the merchants under whose immediate direction the maritime ventures were carried on, were willing to be liable without limit for the debts incurred in their prosecution. The noble classes were willing to risk the amount contributed to the capital of an enterprise in return for a

share in the expected profits. Even had the modern business corporation been fully developed, as to-day, there would have been many cases in which *societe en commendite* or limited partnership, would have been better fitted to the needs of the parties. In the limited partnership the limited partner may be sure of the active interest of the general partners, who are the directors of the enterprise, because such partners are, while the directors of a corporation are not, liable without limit for the debts. On the other hand, the general partners secure the additional funds necessary for the prosecution of the business, and yet remain in control of the business; while if a corporation is formed, all of the contributors to the capital stock acquire the right to take part in the management to the extent of a right to vote for the board of directors.

Again, turning a partnership into a corporation in many cases involves a loss of credit, because the partners who have up to the time of the transformation actually conducted the business, cease to be liable without limit for the debts.

Of course, there are many incidents of a corporation which under a great variety of conditions render it a more suitable business organization than a limited partnership or any other form of business association. The very fact that all the members are liable only for the amount contributed to the common fund makes the corporate form of business organization peculiarly adapted to large enterprises. In large enterprises the obligations incurred are large. Few would subscribe to the common fund if, by so doing, they risked having their entire fortunes swept away if the enterprise was unsuccessful.

The fact, however, that the modern corporation is a business association peculiarly adapted to meet many conditions does not mean that there is no need for other forms of statutory business associations. On the contrary, the aim of the legislature should be to enable business men about to associate for the purpose of carrying on a business, to choose, among several possible forms of organization, the one best suited to their special needs. It is a matter of regret that unlike the business men on the continent of Europe, or even England, the American business man is, in the great majority of cases, practically forced to-day to choose between only two forms; the common law partnership and the corporation.

One of the chief reasons why the American business man is thus limited in organizing a business association to the formation of a partnership or corporation, is the failure of the limited partnership acts to meet the business need for which they were designed.

The Conference on Uniform State Laws in preparing a limited partnership act had a larger problem to face than merely to choose the best among the conflicting provisions of existing state statutes. No existing limited partnership act, and no combinations of the provisions of existing acts would make a satisfactory uniform statute. Existing acts are in more than one respect fundamentally defective. A short statement of the nature of these fundamental defects will show the real nature of the problems with which the Conference was obliged to deal, and also serve to emphasize the fundamental differences between the existing acts and the new uniform law.

If a person in business by himself or if a partnership desires to secure additional capital without forming a corporation or other statutory business association,

there are at least three classes of contracts which can be made with those from whom the capital is secured. One, the ordinary loan on interest; another, the loan where the lender, in lieu of interest takes a share in the profits of the business; and third, those cases in which the person advancing the capital secures, besides a share in the profits, some measure of control over the business.

At first, in the absence of statutes, the courts both in this country and in England, assumed that one interested in a business, is bound by its obligations, carrying the application of this principle so far that a contract, where the only evidence of interest was a share of the profits, made one who supposed himself a lender, and who was probably unknown to the creditors at the times they extended their credits, unlimitedly liable as a partner to such creditors.[1] The influence of cases so holding lasted in England until the decision in *Cox* v. *Hickman*,[2] and in this country in some states until a much later period.[3]

Later decisions have much modified the earlier cases. The lender who takes a share in the profits, except possibly in one or two of our jurisdictions, does not by reason of that fact run the risk of being held as a partner.[4] If, however, his contract falls within the third class mentioned, and he has any measure of control over the business, he at once runs serious risk of being held liable for the debts of the business as a partner, the risk increasing as he increases his control.[5]

[1] *Grace* v. *Smith*, 2 W. Bl. 1998 (Eng. 1776); *Young* v. *Axtell*, 2 H. Bl. 235 (Eng. 1793).

[2] H. L. Cas. 268 (Eng. 1860).

[3] See *Hackett* v. *Stanley*, 115 N. Y. 625 (1889).

[4] On this subject a leading opinion is that of the late Judge Doe of New Hampshire, in *Eastman* v. *Clark*, 53 N. H. 276 (1872).

[5] See specially the opinion of Sir George Jessel in *Pooley* v. *Driver*, L. R. 5 Ch. Div. 458 (Eng. 1876).

As stated, the first limited partnership act was adopted by New York in 1822; the other commercial states, during the ensuing thirty years, followed her example. These statutes were adopted and to a considerable degree interpreted by the courts during that period when it was generally held that any interest in a business made the person holding the interest liable for the obligations incurred in carrying it on. As a result the courts usually assumed in the interpretation of these statutes two principles as fundamental.

> *First.* That a limited (or, as he is also called) a special partner, is a partner in all respects like any other partner except that to obtain the privilege of a limitation of his liability he can show that he has exactly conformed to the statutory requirements in respect to filing a certificate and refrained from participation in the conduct of the business.
>
> *Second.* Thè limited partner, on any failure to follow the requirements in regard to the certificate, or on any participation in the conduct of his business, loses his privilege of limited liability, and becomes, as far as those dealing with the business are concerned, in all respects, a partner.

The courts in thus interpreting the statutes, although they made an American partnership with limited members something very different from the French Societe en Commendite from which the idea of the original statutes was derived, unquestionably carried out the intent of those responsible for their adoption. This is shown by the very wording of the statutes themselves. For instance, all the statutes require that all partners, limited and general, shall sign a certificate, and nearly all state that "If any false statement be made in such certificate all the persons interested in such partnership shall be liable for all the engagements thereof as general partners."

The practical result of the spirit shown in the language and in the interpretation of existing statutes, coupled with the fact that a man may now lend money to a partnership and take a share in the profits in lieu of interest without running serious danger of becoming bound for partnership obligations, has, to a very great extent deprived the existing statutory provisions for limited partners of any usefulness. Indeed, apparently, their use is largely confined to associations in which those who conduct the business have not more than one limited partner; and this for the obvious reason that while the certificate must state the amount and character of the contribution of each limited partner, a false statement by one limited partner, not only makes him a general partner, but makes all the other limited partners general partners also, although they had no reason to believe that the statement of their colleague was untrue.

Again, the fact that no one is hurt by a false statement in the certificate is immaterial. Being false in fact all the limited partners become liable as general partners. Thus in the Massachusetts case of *Haggerty* v. *Foster*,[1] the certificate stated that Foster had contributed cash to a certain amount, when he had given to one of the partners an order to sell United States Bonds belonging to him and then in the custody of the bank the par value of the bonds being equal to the amount of cash which the Certificate declared he had contributed. These bonds were actually sold above par and the proceeds acquired by the partnership so that instead of the creditors being hurt, they were actually benefited by the variation between the statement in the certificate and of the fact. Nevertheless, the court held Foster liable as a general partner for all the debts of the partnership, saying:

[1]103 Mass. 17 (1869).

"It is wholly immaterial that the transaction at the time was honestly intended and understood by the parties to be sufficient; that the securities actually transferred afforded the means by which their cash value was in fact subsequently realized; or that creditors were not actually defrauded."

A reference to the Pennsylvania case of *Fourth Street National Bank* v. *Whitaker*,[2] will further serve to show why business men hesitate to take advantage of existing limited partnership acts. As in most states, the Pennsylvania Act, which has just been repealed by the adoption of the New Uniform Act, contained a section,[3] which stated that:

"Every alteration which shall be made in the names of the parties, in the nature of the business, or in the capital or shares thereof, or in any manner specified in the original certificate shall be deemed a dissolution of the partnership, and every such partnership which shall in any manner be carried on after any such alteration shall have been made, shall be deemed a general partnership."

That is, all the limited partners become unlimitedly liable for all the debts of the partnership, unless the partnership "is renewed as a special partnership." To renew as a limited partnership at the end of the term for which the first limited partnership has been formed, a new certificate must be filed, and if this new certificate contains any false statement, no matter how innocently made, all the limited partners become unlimitedly liable. In the case referred to A, B, C, *et al.*, formed a limited partnership under the Pennsylvania Act of 1836. The original certificate correctly set forth that A and B were limited partners and had contributed $100,000 each. At the end of the term for which the partnership was cre-

[2] 170 Pa. 297 (1895).

[3] Act of March 21, 1836, P. L. 143, Sec. 12.

ated the partners desired to renew. Acting under the supplemental Act of March 30, 1865,[1] they applied for an appointment of an appraiser of the goods belonging to the partnership, and on his report to the effect that these were sufficient to pay all the debts of the firm and leave a balance of more than the original contributions of the limited partners, they filed a renewal certificate, in which they set forth that the amount of their original contributions remained unimpaired. There appears to have been no question that in making this statement they were acting in good faith. As a matter of fact, however, while the property of the partnership was probably more than $200,000—the aggregate of the contributions of the limited partners—the debts were more than sufficient to wipe out all assets, and, therefore, the contributions of the limited partners were more than impaired; they were lost. A and B, because of this false statement, were held unlimitedly liable for all the partnership debts. The court could hardly have avoided this result in view of the wording of the act, although the total possible harm which the unintentional false statement could have possibly done to the creditors was $200,000. Small wonder that statutes, the language of which necessitates such decisions, are of little practical use to individuals or partnerships seeking contributions to their business capital, and that the acts thus fail to meet the economic need which lead to their adoption.

Practically all the differences between the new Uniform Act and the existing statutes are due to the desire of the Conference to present to the legislatures of the several states an act, under which a person willing to invest his money in a business for a share in the profits, may become a limited partner, with the same sense of

[1] P. L. 446.

security from any possibility of unlimited liability as the subscribers to the shares of a corporation.

The act proceeds on the assumption that no public policy requires a person who contributes to the capital of a business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business, provided creditors have no reason to believe at the times their credits were extended that such person was so bound. It, therefore, deals in a radically different manner from former limited partnership acts with the consequences of a false statement in the certificate.

Section 6 provides that if there is a false statement in the certificate, one who suffers loss by reliance on such statement may hold liable any limited partner who knew the statement to be false when he signed the certificate, or within sufficient time before the statement was relied on to have had the certificate canceled or amended.[1]

Again, suppose a person is asked to contribute to the capital of a business conducted by a person or partnership, and that he does so, believing he has become a limited partner, but the certificate required to be filed, is not filed, or being filed is so defective that no limited partnership has been formed. Under existing acts a person in the position described runs a danger of becoming a general partner, if he takes a share in the profits, and a still greater danger if he exercises a limited partner's right to look over the books and give advice to his supposed co-partners. It is immaterial that he may have thought all things had been done necessary for the formation of the limited partnership, and also that the persons doing business with the partnership may

[1]Sec. 25 (3).

at the time they extended credit believe he was a limited partner. Section 11 of the Uniform Act meets this situation by providing that a person who has contributed to the capital of a business conducted by a person or partnership, erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business or other compensation by way of income.

Under existing acts a limited partner is in effect a general partner securing limited liability by complying with the requisites stated in the act. In the Uniform Act the person who contributes the capital, though in accordance with custom called a limited partner, is not in any sense a partner; he is a member of an association having two classes of members, the general partners, and the contributors called limited partners.

As limited partners are not partners securing limited liability by filing a certificate, every detail of which must be complied with, the association is formed when substantial compliance in good faith is had with the requirements for a certificate.

Under existing acts the question whether a limited partner having paid his contribution in full, and, thereafter, loaning money to the partnership shall be treated in respect to such loan as a partner making an advance or as an ordinary creditor, has been the subject of conflicting decisions,[1] although logically under the theory that a limited partner is in all respects a partner, ex-

[1] 20 N. Y. 178; 44 Pa. 150; 35 Conn. 463.

cept that his liability is limited, it follows that for further advances beyond his contributions he should be treated as a partner and postponed to the other creditors. Under the Uniform Act, however, a limited partner, not being in any sense a partner, is not debarred from loaning money or transacting other business with the partnership as any other non-member; provided he does not, in respect to such transaction, accept from the partnership collateral security, or receive from any partner or the partnership any payment, conveyance or release from liability, if at the time the assets of the partnership are not sufficient to discharge its obligations to persons not general or limited partners.[2]

So, also, as limited partners are not in the Uniform Act principals in partnership transactions, their liability, except for known false statements in the certificate,[3] is to the partnership, not to the creditors of the partnership.[4] The general partners cannot, however, waive any liability of the limited partners to the prejudice of such creditors.[5]

Perhaps that section of the act which will have as great practical effect as any in inducing small partnerships desiring additional capital to form a limited partnership under the act, rather than a corporation, is section 13, which permits a person to be a general partner and a special partner at the same time. This provision enables the partners to divide the entire capital of the partnership into shares, and themselves subscribe to the partnership fund on the same basis in respect to a share in the profits and as to capital in case of dissolu-

[2]Sec. 13.
[3]Sec. 7.
[4]Sec. 17.
[5]Sec. 17 (3).

tion as outside contributors. A person who is a general, and also at the same time a limited partner, has all the rights and powers and is subject to all the liabilities of a general partner, except that, in respect to his contribution, he has the rights against the other members which he would have had if he were not also a general partner. If, therefore, A, B and C are limited partners, A and B being also general partners, on the winding up of the partnership after the payment of all debts due outsiders, the remaining assets, would be used first to pay back pro rata the contributions of A, B and C as limited partners.

Other sections of minor, but nevertheless of considerable importance deserve notice.

Section 9 makes clear the rights and powers of a general partner, a matter which existing acts fail to touch. The Uniform Act declares that a general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

"(a) Do any act in contravention of the certificate.

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(c) Confess a judgment against the partnership.

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.

(e) Admit a person as general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate."

Section 10 deals with the rights of a limited partner; providing that he shall have the right to receive the share in the profits stipulated for in the certificate,[1] and a return of his contribution after all liabilities of the partnership to persons not general or limited partners have been paid.[2] It also declares that a limited partner shall have the same rights as a general partner to

"(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them.

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(c) Have dissolution and winding up by decree of court."

Perhaps the detail with which the Uniform Act covers subjects of practical importance which are only dealt with in a general way by existing acts, is best shown by the different methods employed in treating the subject of assignment of a limited partner's interest. In the original limited partnership acts this subject was treated logically under the theory that a limited partner was in all respects except as to his liability a partner. Thus, an attempted assignment of his interest by a limited partner was as effective to produce a dissolution of the partnership as an assignment by a general partner of his interest. By supplemental or amending acts, however, limited partners were permitted to assign. The Pennsylvania statute on the subject, the Act of April 16,

[1]Sec. 15.
[2]Sec. 16.

1858, one of the acts specifically repealed by the recent act putting in force the Uniform Act, is typical. It provides that a limited (special) partner, with the assent of his partners, in writing, first had and obtained, may sell or assign his interest in a limited partnership without causing thereby a dissolution of the partnership. The treatment of the subject in section 19 of the Uniform Act is as follows:

> "(1) A limited partner's interest is assignable.
>
> (2) A substituted limited partner is a partner admitted to all the rights of a limited partner who had died or has assigned his interest in the partnership.
>
> (3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution to which his assignor would otherwise be entitled.
>
> (4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto, or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.
>
> (5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with Section 25.
>
> (6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.
>
> (7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under Sections 6 and 17."

Section 22 adopts the same procedure to subject the

interest of the limited partner in the partnership to the payment of his separate creditors as is adopted in the Uniform Partnership Act to subject the interest of the partner to the payment of his separate debts.[1] Section 22 provides:

> "On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require."

In those states where a creditor on beginning an action can attach debts due the defendant before he has obtained a judgment against the defendant, the commissioners recommended that paragraph 1 of this section read as follows:

> "On due application to a court of competent jurisdiction by any creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of such claim; and may appoint a receiver and make all other orders, directions and inquiries which the circumstances of the case may require."

Among the pitfalls for the unwary limited partner under prior acts, are the provisions for renewal certificates, if it is desired to continue the limited partnership after the time originally stated in the certificate for its termination. Thus section 11 of the Pennsylvania Act of 1836 provided as the statutes of the great majority of the states still provide, that

> "Every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein re-

[1]See section 28 of the Uniform Partnership Act.

quired for its original formation, and every such partnership which shall be otherwise renewed and continued shall be deemed a general partnership."

The unfortunate consequences of any false statement in a renewal certificate, though innocently made, has been shown. In the Uniform Act, the limited partner is fully protected from being caught in the trap of unlimited liability, and at the same time, the provisions for amending and canceling a certificate are set forth in an administrative detail not found in the more or less vague language of existing acts. Sections 24 and 25 of the Uniform Act deal with the question of when the certificate shall be canceled or amended.[1] and the requisites for cancellation and amendment.[2] If any statement in the original certificate has ceased to be true the certificate contains a false statement. Any limited partner knowing the statement to be false within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate under the provisions of section 25, is, as previously explained, under section 6 liable to one who suffers loss by reliance on such statement. Knowing that the certificate contains by reason of changed circumstances, a false statement, it is his duty to see that the certificate is amended to correspond with present facts. But under section 25 (1) a writing to cancel or amend a certificate must be sworn to by all the partners, general and limited. Paragraphs 3 and 4, therefore of this section provide that a person desiring the cancellation or amendment of a certificate, if any of the other limited or general partners refuse to join him in signing the required writing, may file in the proper court a petition for an order of cancellation or amendment. The certificate is actually amended or can-

[1] Sec. 24.
[2] Sec. 25.

celled, as the case may be, when there is filed for record the proper writing duly signed, or a certified copy of the order which the court has made in respect to the petition.

Under section 30 of the Uniform Act any existing limited partnership formed under any statute of the state prior to the adoption of the act, may become a limited partnership under the Uniform Act; or, if its members prefer, they can continue to be governed by the provisions of the act under which their limited partnership was formed until the expiration of the term; and even at the expiration of the term, they may renew under the provisions of the act under which their partnership was formed, provided the original partnership articles contained a clause of renewal.

In Pennsylvania the adoption of the Uniform Act was complicated by the fact that there were two acts in the state under which limited partnerships could be formed. The act under which practically all the limited partnerships in the state were organized was the Act of March 31, 1836, its amendments and supplements; which act, as has already been pointed out, was practically identical with nearly all other limited partnership acts throughout the United States. There was also the Act of May 9, 1899, which provided for the formation of two kinds of business associations; a joint stock association, that is, one in which the liability of all the members is limited to the amounts contributed to the common stock, and the other a true limited partnership, that is, an association in which the liability of some, but not all, of the members was limited to their contributions to the common stock. The commissioners on Uniform Laws not only recommended the adoption of the Uniform Act, but the repeal of all other acts under which a limited part-

nership may be formed. In Pennsylvania, therefore, in order to carry out this recommendation, it was necessary to pass two acts: one, the Uniform Limited Partnership Act, containing a section specifically repealing the Act of March 21, 1836, and its numerous amendments and supplements; the other, an act amending the Act of 1899 in such a way as to confine hereafter its scope to the organization of business associations in which the liability of all the members is limited. In each act specific provisions had to be made for existing partnerships formed under the act repealed and amended.

These details are mentioned not only because they have practical interest in a state which has recently enacted the Uniform Limited Partnership Act, but also because they illustrate the fact that those locally interested in the adoption of uniform acts are often confronted with problems of no little difficulty in preparing the act for adoption by their state legislature. Add to this that the work of looking after the passage of any act through the legislature requires the exercise of tact, also often involves the expenditure of much time, and that the commissioners serve without pay, and it is only a matter of wonder that these commercial acts have been adopted to as great an extent as they have. While it is true that in some states the commissioners have failed to secure the adoption of more than one or two of their commercial acts, in others a considerable proportion have already become law, while in such states as Maryland, Massachusetts and Pennsylvania, where the commissioners have shown extraordinary diligence, practically all—in Pennsylvania all—the uniform commercial acts are already part of the law of the state.

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APPENDIX C TO BRIEF OF RESPONDENTS VETTE, ZUNCKER, REGENSTEINER, CLEMENT STUDEBAKER, JR., AND GEORGE M. STUDEBAKER TO PETITION FOR CERTIORARI.

Mark H. Crehan, *Appellant,*
v.
Ralph C. Megargel *et al.*, *Respondents.*

Decided by Court of Appeals of New York, 234 N. Y. 67, 136 N. E. ...., same case as *Crehan* v. *Megargel* (N. Y. Sup. Ct. App. Div. 1922), 192 N. Y. S. 290.

(Opinion filed July 12, 1922.)

This is an appeal from a judgment of the first Appellate Division reversing an order of the Special Term and sustaining demurrers to the complaint and dismissing the latter.

Sydney R. Wrightington for appellant.

Clinton J. Ruch for respondents Megargel *et al.*

Richard T. Greene for respondents Corinne Bailey, etc.

OPINION.

HISCOCK, *Ch. J.* This action is brought against defendants as alleged members of the firm of Megargel & Company to recover upwards of $500,000 damages for breach of contract made by said copartnership in the State of Massachusetts to carry out certain stock transactions for plaintiff. The complaint sets forth four separate causes of action, each one dealing in different form with the same transactions and alleged defaults, and each is demurred to by every defendant on various grounds including the one that it does not state facts sufficient to establish any liability. The latter ground of demurrer is the only one which we deem it necessary to consider and in

this connection we shall not review in detail all of the allegations of the complaint, for their sufficiency as setting forth a cause of action against the defendants of the character indicated is so clear except at two points that it is unnecessary to do this. We shall confine ourselves to outlining those allegations which present the interesting points in the case which require discussion and it will be assumed that the complaint in other respects is sufficient under its allegations to set forth a cause of action.

In two of the causes of action it is alleged in effect that the present defendants, together with other persons, were general members of the copartnership of Megargel & Company, which committed the breach of contract and caused plaintiff the damages as alleged in the complaint; also that before the commencement of this action plaintiff brought an action against such other persons in the State of Massachusetts and there recovered judgment against them for the same causes alleged in this action; that the present defendants were not joined in that action because they were non-residents of the State of Massachusetts and were beyond the reach of its process. The question to be discussed in connection with these causes of action is the one whether said judgment in Massachusetts operated to merge any cause of action against the present defendants and bar this action.

The other two counts, containing the same allegations concerning the Massachusetts judgment, attempt to set forth a cause of action against the defendants on the theory that through failure to comply with the statutes of this state governing the organization of limited partnerships, they have become liable as general partners in the copartnership of Megargel & Company. These allegations are to the effect that the attempt was made in this state to organize said limited copartnership with the defendant Ralph Megargel as a special partner;

that the other defendants really furnished the capital which he nominally contributed as such special partner; that the certificate and affidavit made and filed as required in the case of the organization of a limited partnership were not sufficient or truthful and that, therefore, said other respondents became subject to the penalty imposed by section 34 of the Partnership Law (Cons. Laws. Ch. 39) which provides that "if any false statement be made in any such certificate or affidavit made either upon the formation or renewal or continuance * * * of such partnership * * * the persons interested therein shall all be liable as general partners." The controlling question here is the one whether defendants were "persons interested" and thus became liable as members of the copartnership in the manner claimed and we shall consider first the two counts presenting this question.

The arrangement under which the other defendants furnished to Megargel the money which he contributed to the limited partnership was set forth in a written agreement, and while the complaint contains certain allegations to the effect that said arrangement was invalid and an unlawful and ineffectual device to evade the law regulating the formation of limited partnerships and that these defendants and not Megargel contributed the capital and became interested in the copartnership these allegations as made are the statements of mere legal conclusions and the sufficiency of plaintiff's complaint is to be tested by the agreement itself, which is not effectively contradicted, altered or condemned, if otherwise valid, by any of said allegations. We, therefore, turn to it for the purpose of determining whether under it defendants other than Megargel became "persons interested" in the partnership so as to become liable as general partners when there was failure to comply with the statute governing the organization of limited partnerships.

The agreement is too long to be quoted or even to be summarized except in the briefest manner possible, having in view the controlling features. It provided for the payment by the other parties, who included these defendants, of certain sums of money to Megargel under a trust by which he was to contribute said moneys as his capital in a special partnership to be organized. First, as between him and the other members of said proposed partnership said moneys when received were to be contributed "in his own name and as his sole and individual special capital" to the partnership. He and the moneys so contributed were in all respects to be subject to the provisions of the partnership agreement which was annexed to the trust agreement and to all laws governing such a partnership, and the subscribers (these defendants) were to "have no right of accounting or other rights whatsoever against the said partnership * * *", but were "in all respects (to) be strangers thereto," and "as regards the trust property and estate or any of the rights and interests guaranteed" they should "look only to the party of the second part (Megargel) or his representatives," except that in the event a dissolution of the partnership should be caused by the death of Megargel and the consequent termination of the trust created thq subscribers were entitled to receive from the survivors of the partnership the amount of special capital that might remain after final liquidation of the business thereof. Second, as between Megargel and the subscribers (defendants) the relation of trustee and *cestui que trust* was created. Megargel on payment to him of the respective amounts subscribed was to issue receipts to the several subscribers of which receipts a registry and record were to be kept. "Upon the receipt by him of any interest or profits to which he might (may) be en-

titled as special partner as aforesaid" the same forthwith were to be distributed through the agency of a trust company amongst the registered holders of said receipts. Various provisions were made for protecting and safeguarding the relations between Megargel and the subscribers but all of these were based upon a relationship of the copartnership solely with Megargel as special partner and none of them in any manner qualified that exclusive relationship or brought the subscribers into the slightest relationship with the copartnership or the members thereof other than Megargel or gave them any voice in or supervision over the affairs of said copartnership.

It was primarily provided that this relation and condition between Megargel and the subscribers were to continue for five years, but the further provision was made between the subscribers that if it should be terminated by the death of Megargel within that time, on the consent of the surviving members of the partnership and the agreement of not less than 51 per centum in amount of the subscribers a new limited or special partnership might be formed with a new special partner.

For the purpose of establishing that under this agreement the subscribers became "interested" in the partnership plaintiff seeks to bring to his aid two different theories of this agreement—one that it is a valid instrument as between the parties to be construed as it is written, the other that it is invalid as providing for an undue suspension of the ownership of the property thereby covered.

Pursuing the first theory the basis of plaintiff's claim is the provision in the Partnership Law relating to limited partnerships already referred to and which provides that if any false statement be made in the certifi-

cate or affidavit essential to the formation of such a partnership "the persons interested therein shall all be liable as general partners." Then plaintiff himself upon this provision he says "The essential claim * * * in this case is that these defendants are the ones who actually contributed the special capital to the partnership of Megargel & Company" and each of said defendants "had a legal interest in said alleged limited partnership as a special partner therein of the time of its attempted formation." Thus the fundamental question becomes one of interpretation of the words "persons interested," in the statute just quoted, as a means of reaching the decision whether these defendants were such persons interested and who, therefore, became liable as general partners because of false certificates and false affidavits as alleged in the complaint.

In the consideration of defendants' liability counsel have discussed the somewhat general question whether the words "persons interested" in the statute should ever be interpreted to mean any one other than him who would be a general partner unless he secured a limited liability under the statutes by compliance with the terms thereof. Under the claims advanced by plaintiff we think that the controversy before us may be decided by the determination of what is perhaps a more concrete question. If the defendants other than Megargel did not contribute capital to the limited partnership in the sense claimed by plaintiff, then we fail to see how on any theory they were "persons interested" within a reasonable interpretation of the statute. We do not think that they did contribute special capital to the partnership in any such manner or with any such result as is claimed.

Clearly they did not contribute capital in the manner, under the conditions and with the results contemplated

by the statute as necessary to establish the status of a special partner. The statute provides that one who desires to enter a copartnership as a special partner shall not only contribute in his own name a specific sum as capital but that he shall establish his status and relationship with the other individuals who are to be copartners by entering into an agreement with them which is to be filed, recorded and published and in which, amongst other things, is to be stated the names of all the partners, including the special partner and the amount of capital which such special partner has contributed; that the name of the special partner shall be posted and that he shall have certain rights to examine into the state and progress of the partnership business and advise as to its management and to receive interest and profits on his investment. These defendants come within none of these provisions.

As between them and the other members of the copartnership they made no contribution of capital, signed no partnership agreement and established no relationship with the copartnership, but were expressly debarred therefrom, and secured no benefit from such copartnership except as it might come in an indirect way through accountability of the special partner for the profits which he had received from the copartnership. On the face of the written agreement they were wholly disconnected from the partnership and utter strangers to its members, its affairs and its capital save in the one instance that in case of the death of their trustee and the dissolution of the firm they were entitled to receive from the firm the residue, if any, of the moneys to which their trustee would have been entitled if living. But this was the arrangement which equity would have enforced without any specific agreement and did not change the effect of their agreement.

Neither did they in our opinion contribute capital in a manner which, while not such as contemplated by the words of the statute, nevertheless came within its spirit and purpose. Of course we do not intend to negative the proposition made by the plaintiff that an arrangement might be made by one who was not named as special partner which would be so designed to evade the statute and give him the rights of that status that he would be held liable under the penalties of the law. Such was the basis of the decision in *Buckley* v. *Bramhall* (24 How. Pr. 455), greatly relied on by the plaintiff. The court held in that case that the person sought to be charged with a general liability had attempted to evade the law by what was characterized a "flimsy contrivance to evade the statute" and, whether this interpretation of the facts was correct or not, that was the theory on which the defendant was held. No such situation is presented to us by the present complaint. While as we have stated there are various allegations of liability upon the part of the defendants under the statute these are conclusions based upon an interpretation of a written instrument and that instrument, read as it is written, establishes between the subscribers and the partnership no contribution of capital, no relation of partners and no contact with or supervision over partnership affairs. The trust is an insurmountable barrier raised between them and the partnership and separating them from an interest in its affairs, and it seems to us to be a valid arrangement and to come within the principles which have been approved both by eminent text writers and the decisions of various jurisdictions in the case of so-called commercial or business trusts as substitutes for business corporations. (Burdick on Partnerships (3d ed.), pp. 43, etc.; Thompson on Business Trusts, etc., p.

28; *Rhode Island Hospital Trust Co.* v. *Copeland*, 39 R. I. 193; *Williams* v. *Milton*, 215 Mass. 1; *Home Lumber Co.* v. *Hopkins* (Kansas Sup. Ct.), 190 Pac. Rep. 601.)

Nor if that could be potential to change our outlook are we able to perceive that this view results in any defeat of a public policy as evinced in the statute relating to limited partnerships. The object of that statute and its predecessors in enactment was to provide for a combination of capital and skill and to enable those who had the former to contribute it to a partnership without other liability than loss of their investment so long as they complied with the statute and refrained from exercising the powers and privileges of general partners. *The interest of a creditor like the plaintiff is that the special capital shall be honestly and fully contributed as provided by the statute and he has no legal or direct interest in the identity of the special partner so long as he contributes his capital and observes all the requirements of the statute.* (*White* v. *Eiseman*, 134 N. Y. 101; *Webster* v. *Lanum*, 137 Fed. Rep. 376.) We fail to see how he is interested in the fact that the special partner has borrowed the capital which he contributes or has received it under some other form of arrangement even less compelling upon him than a loan, so long as the arrangement does not result in a violation or evasion of the statute and of the requirement that the special capital shall be contributed and that the special partner shall not assume the status of a general partner.

Swinging from the viewpoint that under this trust agreement, if valid, respondents were contributors of capital to the special partnership, plaintiff next argues that the trust agreement on its face was invalid as providing for the suspension of ownership of personal property for a fixed term in violation of section 11 of the

Personal Property Law (Cons. Laws, Ch. 41), and that defendants thus became "tenants in common of the fund which was contributed to the capital of the firm and the alleged trustee in contributing it acted as their agent." We believe that there may be various answers to this contention but we shall only consider three of them.

In the first place, we do not think that a fair interpretation of the trust agreement does provide for a suspension of the ownership of the fund which was to be contributed for a fixed period which might outrun two lives. Undoubtedly, as claimed by plaintiff, the trust agreement executed by the defendants and the partnership agreement are to be considered together. The trust agreement provided for the payment of moneys to Megargel as trustee to be contributed by him to the partnership under the articles of agreement for that partnership and those articles did provide primarily for a partnership to continue for the period of five years. Clearly, however, the combined effect of the trust agreement and of the partnership agreement primarily was to limit the former to the life of the trustee and thus any conflict with the statute was avoided. It was, however, secondarily provided in the trust agreement that in case the partnership should be dissolved by the death of the trustee (as undoubtedly would result from said death) "the subscribers agree with each other that with the consent of the surviving partners a new or limited special partnership shall be formed with a special partner to be designated by an appointment in writing to be signed by not less than 51 per centum in amount of the subscribers and that the amount of special capital * * * which as beneficiaries to the trust hereby created they may be severally entitled to receive upon the liquidation of the old firm shall be paid over by them or caused to

be paid to such person and the same shall be contributed by him as special capital to the new partnership. The provisions of this section shall apply to successive dissolutions caused by death of the special partner prior to the expiration of the five year period above mentioned." We think that the only effect of these provisions was an agreement amongst the subscribers, disconnected from the members of the partnership, that if the partnership was dissolved by the death of their trustee, they would enter into negotiations for the formation of a new partnership to which, if the negotiations were successful, they would contribute as capital the moneys which they received upon the dissolution of the old partnership. We think that this secondary provision was too contingent and uncertain to amount to an agreement, when taken into consideration with the other provisions, to suspend the ownership of property for a fixed period of years. The subscribers upon the dissolution of the old firm were entitled to the capital which had been contributed and it thus came into their ownership. It is possible that if they failed to form a new firm as provided they might be liable upon a contract to someone who was injured by such failure, but that, we think, would be the limit of the provisions which they undertook.

In the second place, we are unable to conclude that plaintiff in this action can attack the validity of the trust agreement even if it be subject to successful attack. He is not a party to it. He has no interest in the property which is the subject of the trust. He is not seeking to enforce any lien thereon which is obstructed by the trust agreement. He is not defending himself against any attack which is based upon the trust agreement. He is an utter stranger to the entire proceeding, simply seeking

to have an agreement held invalid in order that he may establish a personal liability against the parties who entered into it. No authority has been cited which sustains his right to make such an attack and we know of no principle which authorized it. (*Bohn Mfg. Co.* v. *Hollis,* 54 Minn. 223; *Nat. Fire Proofing Co.* v. *Mason, Builders' Assn.* 169 Fed. Rep. 259; *Mallory* v. *Thomas,* 71 Kan. 562; *First Nat. Bank* v. *Nat. Broadway Bank,* 156 N. Y. 459.)

But lastly even if we should adopt plaintiff's view upon both of the foregoing points we do not see how it would carry him forward to any position of success. The subscribers placed their money in the hands of Megargel under an authority contained solely and exclusively in this trust agreement. That was his only warrant for investing the moneys which he had received as special capital in the partnership. If it now should be held that this instrument was void and conferred no such authority we fail to see how the relationship of principal and agent would be established in respect of the contribution of this capital or how an unlawful trustee would be turned into a lawful agent. It would seem that under such a contingency as that Megargel would have in his hands some money contributed by the subscribers without any authority for its use and that the result would be either that he might retain the moneys or that the subscribers might disaffirm everything that he had done with it and demand its immediate repayment.

Thus we are led to the conclusion that in the statement of the two causes of action which we have been discussing the complaint does not state facts sufficient to show any liability upon the part of any of the respondents except the respondent Megargel. As to him the

complaint does state a cause of action subject to the consideration of the question now to be discussed in connection with the other two causes of action.

It will be remembered that in these causes of action defendants are alleged to have been general partners, and the only question to be discussed is the one whether the judgment recovered by plaintiff in the courts of Massachusetts upon the same causes of action here involved against several other members of the firm of Megargel & Company operated to merge the cause of action against these defendants who were not joined because non-residents and not subject to process in said state. The claim that the Massachusetts judgment did so operate is based on the common-law rule that a cause of action against several joint debtors, as copartners are, is merged in a judgment against part of them. There is no allegation that this common-law rule has been changed by statutory enactment in the state of Massachusetts and, therefore, we assume that it exists and we shall assume without deciding that under the full faith and credit clause of the Federal Constitution we are compelled in this action to give to the Massachusetts judgment the effect claimed for it if such would be the effect at common law. We do not, however, think that under the best established rule the judgment under the circumstances set forth did have the effect claimed for it.

This rule of merger of joint obligations is a technical one inherited from the common law, which often has been productive of injustice and which is enforced by courts with more or less restlessness and repugnance. Whatever the origin of the rule, it is qualified to-day by the principle of election, it being held that where a creditor holding the joint obligation of several parties proceeds to recover judgment against part of them it is evidence

of a choice to thus hold part and let the others go. Therefore, various exceptions have been engrafted upon the rule to the effect that when the action of the creditor is controlled by circumstances which negative any idea of an election he will be exempted from the effects of the judgment as a merger. (*U. S. Printing & Lith. Co.* v. *Powers,* 233 N. Y. 143.)

Whatever course of reasoning may have been adopted in various decisions, it is in accordance with this rule that it has been held in many jurisdictions that where a creditor bringing suit upon a joint obligation is unable to get service upon some of the obligors because they are beyond the jurisdiction in which he is acting, his judgment there recovered will not be regarded as a bar against the obligors not served, when he is able to obtain jurisdiction of them in some other forum. That doctrine was accepted by the courts of this state in an early decision which so far as we are aware has never been questioned and directly or in effect has been adopted by the courts of many other states. (*Brown* v. *Birdsall,* 29 Barb. 549; *Third Nat. Bank of St. Louis* v. *Graham,* 174 App. Div. 503; *Campbell* v. *Steele & Co.* 11 Penn. St. 394; *National Bank* v. *Peabody & Co.* 55 Vt. 492; *Wood* v. *Watkinson,* 17 Conn. 500; *Merriman* v. *Barker,* 121 Ind. 74; *Rand* v. *Nutter,* 56 Me. 339; *Tibbetts* v. *Shapleigh,* 60 N. H. 487; *Yoho* v. *McGovern,* 42 Ohio St. 11; *Bradley Eng. etc. Co.* v. *Heyburn,* 56 Wash. 628; *Beck & Pauli Lith. Co.* v. *Wackers & Birk B. & M. Co.* 76 Fed. Rep. 10.)

Holding, therefore, that the weight of authority in this country is to the effect that the common-law rule of merger does not apply to a judgment recovered as was plaintiff's, in favor of those who were beyond the jurisdiction of the court which rendered it, we are not bound to give to the Massachusetts judgment the effect claimed by the defendant.

Coming then to the present suit with no such bar in his way the plaintiff's right to proceed is additionally secured by section 1946 of the Code of Civil Procedure which provides: "Where for any cause, one or more partners have not been joined as defendants in an action upon a partnership liability, and final judgment has been taken against the persons made defendants therein, the plaintiff, if, the judgment remains unsatisfied, may maintain a separate action upon the same demand, against each omitted partner."

This section clearly authorized the commencement of action against these defendants upon the facts set forth in the cause of action under review unless it be true as claimed by defendants that it required a separate action to be brought against each partner who had been omitted in the Massachusetts action. We should be reluctant to give any such narrow construction as that to this remedial provision and which if adopted would require in the present case a multitude of actions instead of one. That question, however, is not before us for there is no demurrer on the ground of such improper joinder of defendants or causes of action.

Therefore, we conclude that the allegations respectively of the second and fourth causes of action do set forth facts sufficient to constitute a cause of action against these defendants and that the demurrers to them should be overruled.

Accordingly the judgment of the Appellate Division appealed from in so far as it reverses the order of the Special Term overruling the demurrer of each of the defendants to the first and third causes of action and dismissing the complaint, except as to the defendant Ralph Megargel, should be affirmed and said judgment in so far as it reverses the order of the Special Term overruling

the demurrer of the defendant Ralph Megargel to said causes of action and in so far as it reverses the order of said Special Term overruling the demurrer of each of the defendants to the second and fourth causes of action and dismissing the complaint should be reversed and the order of the Special Term affirmed, with costs in this court and the Appellate Division and with leave to said defendants to withdraw demurrers and plead over within twenty days on payment of said costs.

HOGAN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, *JJ.*, concur.

Judgment accordingly.*

*Additional facts in the case of *Crehan* v. *Megargel*, *supra*, are set forth in the opinion of the Supreme Court of New York, Appellate Division, in the same case, 192 N. Y. S. 290.

FILED
SEP 28 1922
WM. R. STANSB
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. [redacted]59

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES, JOHN JANCA, I. FIEGEL, FRED MAYER, E. H. ALLEN, GEORGE B. GIFFORD AND HAROLD LACHMAN,

Petitioners,

vs.

HENRY VETTE, PETER M. ZUNCKER, THEODORE REGENSTEINER, CLEMENT STUDEBAKER, JR., GEORGE M. STUDEBAKER, FRANK A. HECHT AND CLARA K. HECHT, EXECUTORS OF THE WILL OF FRANK A. HECHT, AND JOSEPH M. FINN,

Respondents.

BRIEF OF RESPONDENTS VETTE, ZUNCKER, REGENSTEINER, CLEMENT STUDEBAKER, JR., AND GEORGE M. STUDEBAKER, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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APPENDICES.

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Cases Cited.

Cited by Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 443

IN THE MATTER OF MARCUSE & COMPANY,
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C. B. GILES, JOHN JANCA, I. FIEGEL, FRED MAYER, E. H. ALLEN, GEORGE B. GIFFORD AND HAROLD LACHMAN,

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(Italics ours)

STATEMENT OF FACTS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The statement of facts set forth in the petition is not only incomplete, but erroneous and misleading in a number of important particulars. It contains a number of inaccuracies, hence we deem a brief statement necessary.

The respondents filing this brief are sometimes referred to as "these respondents."

On April 2, 1917, a limited partnership agreement was signed, under which, when effective, Ben Marcuse and Lew H. Morris were to be general partners and Henry Vette, Peter M. Zuncker, Theodore Regensteiner, Richard Yates Hoffman, Frank A. Hecht and Joseph M. Finn were to be limited partners. (Rec., 340, 413-477.)

Nine duplicate originals were signed and left in escrow with Colonel Foreman, of Foreman, Robertson & Blumrosen, attorneys for Vette and Zuncker. (Rec., 647, 697, 748.) These agreements *were not to be delivered or become effective,* until certain things had been done, as shown by a letter Colonel Foreman wrote to each of the signers of the documents to which they assented in writing. (Rec., 413, 477-487, 748, 749, 868.)

The then projected firm was to carry on a brokerage business. Marcuse afterward learned that a limited partnership with more than two limited partners would not be admitted to the New York Stock Exchange, and that the limited partners must not be in any other business. (Rec., 405, 406.)

The contemplated limited partnership would have had six limited partners, four of whom were actively engaged in other business. (Rec., 494, 557, 868, 911.) The limited partnership contemplated by the documents left in escrow *was thereupon abandoned* (Rec., 552, 574, 699, 764, 765, 793, 794, 869) and all of the parties were so notified by Marcuse. (Rec., 698, 699.) None of the signed documents held by Colonel Foreman were delivered, no certificate of partnership was filed, no money was paid in by anybody (Rec., 698, 743) and nothing further was done as to this uncompleted transaction. (Rec., 491, 698, 699, 794, 921, 928, 929.) Later Stein, attorney for Marcuse, Morris and Finn, and Robertson, one of the attorneys for Vette and Zuncker, formally

canceled all of the documents while still held in escrow by Colonel Foreman, by tearing off part of the signatures. (Rec., 848, 865-867.) The escrow conditions were not fulfilled prior to the abandonment of this partnership arrangement and the formal cancellation of the documents. (Rec., 685, 698.)

Later Marcuse and his attorney Stein sought to organize a limited partnership with only two limited partners. The Studebakers, through Buckingham their attorney, refused to contribute anything to the capital of this proposed firm or to be connected with it as limited or special partners. (Rec., 764-766, 869, 870.) Zuncker refused to have anything to do with it (Rec., 575) and Zuncker represented Vette also. (Rec., 758, 848.) Petitioners' assertion that none of the parties intended to abandon the originally contemplated limited partnership, but intended only to circumvent and evade the rules of the New York Stock Exchange is without foundation, and the District Court did not so find.

Marcuse and Stein induced Hecht and Finn to become limited partners in the new firm which was to be known as Marcuse & Co. (Rec., 410, 490, 491, 494, 701.) On June 30, 1917, Marcuse and Morris, as general partners, and Hecht and Finn, as limited or special partners, executed a limited partnership agreement. (Rec., 352-361.)

By this contract Hecht and Finn each agreed to contribute $95,000 as limited partners to the capital of the firm. This $190,000 was raised by the creation of what is known as the "Hecht-Finn Trust." (Rec., 367-374.) This Hecht-Finn Trust executed to Chicago Title & Trust Company as trust company, and bearing date June 30, 1917, after reference to the limited partnership agreement which had been entered into *by Marcuse, Morris, Hecht and Finn,* provided that Hecht and Finn, jointly

as trustees, should hold their interest in said co-partnership, as a trust fund, in accordance with said trust agreement. By its terms certificates were to be issued by Chicago Title & Trust Company, for such a number of shares, as at $500 per share, would total $190,000. Profits of the firm of Marcuse & Co. distributable to the two limited partners were to be paid to Chicago Title & Trust Company as trustee, AND WHEN (AND NOT BEFORE) SO SEGREGATED AND SEPARATED FROM THE ASSETS OF THE PARTNERSHIP OF MARCUSE & CO., WERE TO BECOME A PART OF THE HECHT-FINN TRUST FUND, and be distributed by the Chicago Title & Trust Company among the then holders of such trust certificates. Paragraph six of said trust agreement was as follows:

> "*The holders of trust certificates shall have no right, title, or interest, directory, proprietary or otherwise, in the said copartnership or in or to the property or assets of said copartnership,* the entire right, title and interest therein and thereto, both legal and equitable, being vested in the trustees, nor shall the holders of trust certificates by the acceptance thereof be construed to have assumed any liability whatsoever with respect to said trust or said copartnership, but *the interest of each and every holder of trust certificates shall consist solely of the right to receive his proportionate share of the net part or parts of the trust fund* from time to time payable to the trust company hereunder, including the proportionate share of such holder of the *corpus* of said fund upon any dissolution of said copartnership, and such right shall be, and be taken to be, personal property and may be assigned and transferred as such subject to the limitations herein and in said trust certificates set forth and contained." (Sec. 6, Pet. Ex. 6, Rec., 372.)

Certificates were issued to Hecht for 50 shares, Finn 50 shares, Hoffman 100 shares, Regensteiner 57 shares, Vette 60 shares and Zuncker 50 shares. (Rec., 395-397, 498, 831, 835.) This trust agreement related to profits

of the limited partnership ONLY AFTER THEY HAD BEEN SEGREGATED FROM AND PAID OUT BY THE PARTNERSHIP, AND TO PROCEEDS OF LIQUIDATION ONLY AFTER SUCH LIQUIDATION, SO THAT BOTH CLASSES OF PROCEEDS COULD GO TO BENEFICIARIES UNDER THE HECHT-FINN TRUST ONLY AFTER SUCH FUNDS WERE NO LONGER PARTNERSHIP FUNDS. Vette, Zuncker Regensteiner and Hoffman each paid to Hecht and Finn, trustees under the Hecht-Finn Trust, the full amount (at $500 per share) due for the shares issued to them. (Rec., 387-390, 506, 507, 687, 688, 875, 881.) Later Regensteiner divided his interest, surrendered his certificate and had new certificates issued for a portion of the shares to him and for the other shares to another as his transferee. (Rec., 830-834.)

Studebaker Bros. trust is an investment *fund* held under deed of trust by Chicago Title & Trust Co. trustee for the ultimate benefit of various persons including among others, Clement Studebaker, Jr., and George M. Studebaker. This trust was created long before the creation of Marcuse & Co. and without reference to that firm. The shares for which a certificate was issued to Hoffman, were purchased by Studebaker Bros. trust, and paid for by its check. (Rec., 390, 875.) The Hoffman certificate was by him assigned to and held by the trustee of Studebaker Bros. trust, as a part of the assets and investments of that trust. (Rec., 835-839.) Hecht and Finn endorsed the checks thus delivered to them and delivered the same, together with their own checks, to Marcuse & Co. (Rec., 386-392, 507.) In this manner Hecht and Finn procured the $190,000 which they as limited partners contributed to the capital of Marcuse & Co.

On June 30, 1917, Marcuse, Morris, Hecht and Finn executed a certificate, under the Limited Partnership

Act then in force. (Rec., 364-366.) This was required to be filed with the county clerk of Cook County, Illinois. Mr. Sidney Stein (attorney for Marcuse), who prepared the limited partnership agreement and this certificate, undertook to file it. June 30th was on Saturday. (Rec., 502.) The county clerk's office closed before the certificate could be filed (Saturday afternoon being a half holiday), and, therefore, he did not file the certificate until the following Monday, July 2nd. (Rec., 364-366, 502.)

The certificate was in accordance with the provisions of the Limited Partnership Act in force in Illinois on June 30, 1917. In this certificate Hecht and Finn were named as limited partners and the amount of their contributions as $95,000 each. (Rec., 365.) On Monday, July 2, 1917, the firm of Marcuse & Co. began business. (Rec., 535.)

Hecht and Finn were held out as limited partners on the firm stationery and on the firm business cards. (Rec., 734.) They were held out to the world as limited partners. No one considered them as anything else. They did not assume to be anything else. Vette, Zuncker, Regensteiner, Hoffman and the two Studebakers did not appear in connection with the firm. No creditor of Marcuse & Co. traded with that firm, on account of the credit of any of these people, or had any knowledge of the source of the money which Hecht and Finn contributed to the capital of the firm.

The business continued until March 11, 1920, when a petition in bankruptcy was filed in the United States District Court at Chicago. (Rec., 43-46.)

On June 28, 1917, the Illinois legislature passed a new General Partnership Statute and a new Limited Partnership Statute, being the "Uniform Acts" originating

with the American Bar Association, and the committee on Uniform State Legislation. These acts became effective on July 1, 1917, which was Sunday. (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a. Cahill's Ill. Rev. Stat. 1921, Ch. 106a, Smith's Ill. Rev. Stat. 1921, Ch. 106a.) Thus the old statute was in force on Saturday when the limited partnership contract, and the Hecht-Finn Trust Agreement were executed. If the limited partnership certificate had been filed with the clerk of the County Court that day the limited partnership would have become effective, but on the following Monday (July 2nd) when the certificate was filed, the old Limited Partnership Act had been superseded by the new Limited Partnership Act. By the terms of the old Illinois Limited Partnership Act, a limited partnership could be formed to carry on a brokerage business. A limited partnership would become effective when and if, and only when and if, the certificate thereof was filed with the county clerk. (Hurd's Rev. Stat. of Ill. 1915-1916, Ch. 84, Secs. 6, 8.) The new Limited Partnership Act, of 1917, which superseded the older one, over Sunday, did not provide for limited partnerships to carry on a brokerage business.

The dividends paid upon the limited partnership capital in the firm were paid to Chicago Title & Trust Company, trustee for that purpose, under the Hecht-Finn trust agreement, and were thus segregated from the assets of the firm and by that company distributed among the then certificate holders in accordance with the terms of the Hecht-Finn trust agreement (Rec., 371, 735-737) in every case but one. A four per cent dividend was declared in January, 1918. Vette and Zuncker were then customers of Marcuse & Co. and had trading accounts with that firm. Instead of paying the amount

of this dividend on the $190,000 to Chicago Title & Trust Company (as Marcuse & Co. should have done), Marcuse apportioned this according to the amounts of the then outstanding certificates and credited the amount apportioned to the Zuncker certificate to Zuncker's trading account and the amount apportioned to the Vette certificate to Vette's trading account. (Rec., 436, 437.) There is nothing in the record to indicate that either Vette or Zuncker knew, at that time, that this had been done. Zuncker had no recollection of it. (Rec., 592, 593.) The amounts apportioned to the Finn certificate, the Regensteiner certificate and the Israel Grollman certificate were sent to each of them by the checks of Marcuse & Co. (Rec., 723, 725.) For the amount due on the certificate held by Studebaker Bros. Trust, Marcuse sent a check to Scott Brown, who is the manager of that trust. Brown refused to receive this check and returned it to Marcuse & Co. because the money should have been paid to Chicago Title & Trust Company as trustee under the Hecht-Finn Trust. (Rec., 736.) Marcuse then, instead of making out a check payable to Chicago Title & Trust Company, made out another check to Frank G. Gardner, an official of the Chicago Title & Trust Company. (Rec., 736.) He is the official to whom a trust certificate was issued upon a surrender and cancellation of the Hoffman certificate. (Rec., 837, 838.) This certificate Gardner endorsed in blank and turned over to Chicago Title & Trust Company, where it has since been held as a part of the securities belonging to Studebaker Bros. Trust. (Rec., 839.) Gardner endorsed this check and turned it over to Chicago Title & Trust Company and that company put it through the bank (Rec., 739), rather than returning it to Marcuse & Co. and insisting that another one be made out to Chicago Title & Trust Company. Marcuse, when

asked to explain why the attempt was made to handle this dividend in the manner as here explained, said that Hecht had suggested that it might save the expense of paying an extra commission to Chicago Title & Trust Company and said that Marcuse & Co. sent these checks out direct, but notified the Chicago Title & Trust Company that they had done so. (Rec., 736.) This was the only dividend he ever attempted to handle in that way. (Rec., 737.)

The original petition in bankruptcy was filed on March 11, 1920, against Marcuse, Morris, Hecht and Finn, as copartners doing business as Marcuse & Co. (Rec., 43.)

One Lachman filed an intervening petition against Marcuse, Morris, Hecht and Finn, in which he set forth the situation with reference to the new Limited Partnership Act's superseding the old act and that the certificate thereof had not been filed until after the new act became effective and claimed that Marcuse, Morris, Hecht and Finn were, therefore, all liable as general partners. But no reference was made to any one else. (Rec., 57.)

Neither Hecht nor Finn nor any of these respondents knew that the limited partnership certificate had not been filed until Monday, July 2, 1917, nor were they aware of the legal effect of that fact until the present litigation was started. (Rec., 407-409, 889-891.) Upon being advised of this claim by counsel Hecht and Finn promptly tendered to the bankruptcy receiver, $46,000, being an amount larger than the profits which had been paid out to them by the partnership, with interest (Rec., 891, 892), together with a document of renunciation of all profits and benefits in compliance with Section 11 of the Uniform Limited Partnership Act of Illinois. (Rec.,

889, 891.) Later this money was paid to the clerk of the District Court. (Rec., 105.)

Section 11 of the Uniform Limited Partnership Act is as follows:

> "A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income." (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 55. Smith's Ill. Rev. Stat. 1921, Ch. 106½, Sec. 54, Cahill's Ill. Rev. Stat. 1921, Ch. 106a, Sec. 55.)

In the answer of Hecht and Finn to the original and intervening petitions (Rec., 84, 93, 106, 116, 127, 137) they set forth, among other things, in substance the provisions of Section 11 of the new Limited Partnership Act and the tender and renunciation, etc., which they had made upon learning of this situation, and that at no time had either of them participated in the management, control, operation or conduct of the business of said copartnership or taken any action in excess of action rightfully permitted to a limited partner in a limited partnership, etc.

On April 30, 1920, Fiegel, one of the original petitioning creditors, and Jacobs and Frazee, intervening petitioning creditors, filed an amended petition (Rec., 208) the parties defendant to which were:

(a) Marcuse and Morris;

(b) Hecht and Finn;

(c) Vette, Zuncker, Regensteiner, Hoffman, Clement Studebaker, Jr., and George M. Studebaker.

This amended petition alleged merely that Marcuse, Morris, Finn, Hecht, Clement Studebaker, Jr., George M. Studebaker, Hoffman, Regensteiner, Vette and Zuncker, doing business under the trade name of Marcuse & Co. had their principal place of business in Chicago and were engaged in buying and selling stocks and other securities; that the petitioning creditors had provable claims against them, etc., and that each of them individually and as copartners were insolvent and had committed acts of bankruptcy and praying that they be individually and as copartners as Marcuse & Co. adjudged to be bankrupt.

Vette, Zuncker, Regensteiner, Hoffman, George M. Studebaker, and Clement Studebaker, Jr. (now for the first time brought into the case by petitioning creditors) filed their separate answers to the amended petition (Rec., 289, 297, 304, 310, 317, 323) setting forth the facts with reference to the organization of the firm, the Hecht-Finn Trust, the purchase of certificates, etc., and denying that they were members of the firm of Marcuse & Co. either limited or general or liable for the debts of that firm.

On this state of the record Landis, J., by an order entered July 1, 1920 (Rec., 333), found that the firm of Marcuse & Co. was composed of Ben Marcuse, Lew H. Morris, Joseph M. Finn, Frank A. Hecht, Clement Studebaker, Jr., George M. Studebaker, Theodore Regensteiner, Henry Vette, and Peter M. Zuncker and referred the cause to a referee for a hearing on the assets and liabilities up to March 11, 1920, when the original petition in bankruptcy was filed. Hoffman was not included in this order. The court thus held that all of these parties were general partners and directed an inquiry to determine whether the firm of Marcuse & Co. and all of these individuals as general partners was or was not insolvent.

Decision of Circuit Court of Appeals.

A petition to review and revise was filed to procure a review of this order and the Circuit Court of Appeals held originally and afterward on elaborate application for a rehearing:

(1) That Hecht and Finn in good faith believed themselves to be limited partners in a limited partnership.

(2) That this being the case their complete compliance with Section 11 of the new Uniform Limited Partnership Act exempted them from liability.

(3) That even if this were not so the Uniform General Partnership Act prevented their liability as general or any kind of partners.

(4) That Hecht and Finn not being liable as general partners, of course, the other respondents whose only relation was to Hecht and Finn could not be held either as general or limited partners or as any partners.

Having reached this conclusion the Court of Appeals found it unnecessary to pass on the further contentions set up by the other respondents. These undisposed of defenses of Vette, Zuncker, Regensteiner and the two Studebakers were:

(1) That these respondents were *cestuis qui trust* under the Hecht-Finn Trust Agreement and never became partners either general or limited.

(2) That even if Hecht and Finn were held to be general partners with Marcuse and Morris, yet these respondents, if parfners at all, could be nothing more than subpartners of Hecht and Finn and that as such subpartners they would not be members of the firm of Marcuse & Co. and would not be liable to the creditors of that firm for its debts.

In addition to these defenses the Messrs. Studebaker contended that even if their preceding mentioned defenses were inadequate, they were not liable because they had not even purchased a trust certificate; that the money with which said certificate was purchased was the property of Studebaker Bros. Trust, a fund the legal title to which was in a trustee and that if the purchase from Hecht and Finn of a trust certificate operated to make the purchaser a general partner in Marcuse & Co. such purchaser was the trustee and the trust fund (which, operating through Scott Brown, its manager, had bought the certificate) and not the Studebakers as individuals.

None of these additional defenses of Vette, Zuncker, Regensteiner or the Studebakers became necessary to be passed on by the Court of Appeals.

No Ground for a Writ of Certiorari.

On this state of facts it will be apparent:

(a) That there is no public interest involved in this case. The language of the Uniform Act is plain and unequivocal. It offers no field for construction.

In addition to its plain language the *specific purpose and intent of Section* 11 was so thoroughly elucidated by the committee which framed the act and procured its enactment in the law as to leave no possible room for doubt as to what the section means.

Furthermore, the facts in the instant case are so peculiar and unique that no decision in this case would ever affect any other litigant. It is hardly conceivable that another case like this will ever arise.

(b) The case does not involve a federal question in any sense. Neither a constitutional question nor the construction of a federal statute is involved.

(c) The fact that there was a dissenting opinion in the Court of Appeals is no basis for the allowance of a writ of certiorari.

(d) If there was "palpable error" (which there was not) in the construction given by the Court of Appeals to the uniform statutes that question will properly reach this tribunal when some other Court of Appeals makes a conflicting construction—a thing which on these peculiar facts most likely will never happen and this court may then, if it deems it proper, pass upon the questions in order to set at rest the conflict between the Circuit Courts of Appeal.

(e) The amount involved according to the record is large, but this is no ground for certiorari. If it were, this court would be so flooded with private litigation that it would not have time to properly consider and dispose of the class of cases really designed to be considered and passed upon by this court in the proper performance of its functions.

(f) No question of uniformity arises. There is no conflict between the Circuit Court of Appeals and any other Circuit Court of Appeals, or between the Circuit Court of Appeals and any state court.

BRIEF.

I.

The questions here involved depend wholly upon the construction of the limited partnership contract and the Hecht-Finn Trust Agreement executed June 30, 1917, and the proper application of the rules of law applicable thereto.

II.

There is no dispute as to any of the substantial and controlling facts and the question whether an order may stand in such a case is a review as to a matter of law within the provisions of Section 24b of the Bankruptcy Act, which may be passed upon by the Circuit Court of Appeals on a petition to review and revise.

In re Kuhn Bros. 234 Fed. 277.

The jurisdiction of the Circuit Court of Appeals was conceded by all parties.

III.

This case does not involve either a question arising under or calling for the application or construction of a provision of the federal Constitution or the construction of a federal statute, nor is there a conflict between Circuit Courts of Appeals. There is no question of public interest involved. The parties have had their day in two courts and this is not the kind of a case which should consume the time and receive the consideration of this court.

IV.

The fact that one of the judges of the Circuit Court of Appeals dissented is not a ground for certiorari. Certiorari has been repeatedly denied in cases where there was a dissenting opinion. A few of the most recent cases are (Vols. 254-256, U. S. Reports):

In re Garden City Parlor Furniture Co.—Rusnak v. *Commerce Trust Co.* (C. C. A. 7, Oct. 1920), 268 Fed. 318. (Bankruptcy Appeal, District Court affirmed and later reversed on rehearing by a divided court differently composed. Three judges wrote opinions contrary to that of the two judges whose opinion reversed the District Court.) Certiorari denied, 255 U. S. 568.

Eikland et al. v. *Casey et al.* (C. C. A. 9, 1920), 266 Fed. 821. (District Court reversed by divided court—two judges to two.) (Certiorari denied, 254 U. S. 652.

Wetzel et al. v. *Empire Gas & Fuel Co.* (C. C. A. 5, 1920), 264 Fed. 865. (Dist. Court reversed by a divided court—two judges to two.) Certiorari denied, 254 U. S. 635.

Dolbear v. *Gulf Production Co.* (C. C. A. 5, Aug. 1920), 268 Fed. 737. (District Court affirmed by divided court.) Certiorari denied, 255 U. S. 569.

United States v. *Levinson et al.* (C. C. A. 2, 1920), 267 Fed. 692. (District Court reversed by a divided court—two judges to two.) Certiorari denied, 254 U. S. 645.

In re Dement (Ct. of App. of D. C. 1920), 263 Fed. 813. (Patent Commissioner affirmed by

divided court.) Certiorari denied, 254 U. S. 630.

Mente v. *Eisner, Int. Rev. Coll.* (C. C. A. 2, 1920), 266 Fed. 161. (District Court affirmed by divided court.) Certiorari denied, 254 U. S. 635.

Producers Coke Co. v. *McKeefrey Iron Co.* (C. C. A. 3, 1920), 267 Fed. 22 (District Court affirmed by a divided court.) Certiorari denied, 254 U. S. 650.

Lehigh Valley R. Co. v. *John Lysaght, Limited* (C. C. A. 2, 1921), 271 Fed. 906 (District Court affirmed by divided court.) Certiorari denied, 256 U. S. 704.

Touching briefly on the principal contentions we contend that:

Section 11 of the Uniform Limited Partnership Act.

(a)

The construction given by the Circuit Court of Appeals, to the Uniform Limited Partnership Act, was not erroneous. For many years, there had been on the statute books of Illinois a Limited Partnership Law. It was in effect on Saturday, June 30, 1917. Under that law, Marcuse and Morris, and Hecht and Finn, attempted to form a limited partnership. They drew articles, in all respects in conformity therewith. If the limited partnership certificate had been filed on Saturday, June 30th, with the county clerk, the attempted limited partnership would have been an accomplished fact. In that event, Hecht and Finn beyond all question would have accomplished limited liabiliy.

The Illinois statute, however, provided, that the lim-

ited partnership should become effective *when* the articles were filed with the county clerk. The attorney for Marcuse, who undertook to attend to the filing, was too late, on Saturday, and therefore filed the instrument on Monday morning, July 2nd.

In the meantime, on Sunday, July 1st, a new Limited Partnership Act went into effect, expressly repealing the old one. (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a; Smith's Ill. Rev. Stat. 1921, Ch. 106½; Cahill's Ill. Rev. Stat. 1921, Ch. 106a.)

The nonfiling of the certificate, and also the passage of the new act, was unknown to any of these respondents until after the bankruptcy suit brought it to their attention.

The new limited partnership statute, which was in effect on July 2nd, and subsequently, contained Section 11, which is set forth in full herein at p. 10.

Hecht and Finn *believed* themselves to be limited partners in a limited partnership. Of this there can be no doubt. As soon as they learned that (by reason of the nonfiling of their certificate on Saturday) it was claimed that they were not limited partners and that their belief might be erroneous, they immediately tendered to the receiver in bankruptcy $46,000 in money, being an amount greater than they had received from the partnership with interest thereon. This they did on the advice of counsel under the provisions of said Section 11.

The language of Section 11 is plain and unequivocal. It bases relief not upon mistake of law or mistake of fact, but upon the *belief* of the interested party. It is a broad remedial provision. Its purpose is to afford relief to persons caught in just such a technical trap, as that which closed on Hecht and Finn. However, the

Court of Appeals, plain as is the statute, had still further light upon its purpose.

The present Illinois limited partnership statute is one of a series of uniform statutes recommended for adoption by the American Bar Association. It was prepared by a committee of the National Conference on Uniform State Laws. When it was submitted to the Illinois legislature there was submitted therewith an explanatory note setting forth the object and purpose of the proposed act. This practice has been followed in submitting all of the uniform statutes. This explanatory note was signed by Professor William Draper Lewis, Dean of the College of Law of the University of Pennsylvania, who was the draftsman for the committee. Its text is set forth as Appendix A hereto. (Appendices, pp. 1-5.)

The essence of the report is that the existing partnership acts of various states, as they have come to be interpreted by the courts, are so *drastic* as to make almost useless the entity known as the limited partnership. The reason set forth is that *strict compliance* is always necessary to effectuate the limitation of liability of the limited partner, and that failure to file articles, and other similar technical defects, are generally held to make the limited partner liable as a general partner. The report sets forth that this is a state of affairs which is unreasonable, not required by justice or public policy, and should be remedied; and that where persons have contributed as limited partners to the capital of the limited partnership, *in good faith*, they should not be held liable as general partners, but should be protected from that liability, and that this statute is designed to remedy that wrong. With respect to Section 11, the report says:

> "The limited partner, not being in any sense a principal in the business, failure to comply with the

requirements of the Act in respect to the certificate, while it may result in the nonformation of the association, *does not make him a partner, or liable as such.* The exact nature of his liability in such cases is set forth in Section 11." (Appendix A,* p. 4.)

The National Conference, when it approved the limited partnership statute, also approved the report of the committee which drafted it, which contained the following:

"The committee is of the opinion that the act, as drafted, preserves all the commercial advantages of the present Limited Partnership Acts and does away with the very serious disadvantages which arise from regarding a person who has contributed to the capital of the partnership as a partner, to be held unlimitedly liable for all partnership debts, unless he has strictly complied with the requirements of the statute." (Proceedings of 26th Ann. Meeting, Nat. Conf. of Commrs. on Uniform State Laws, 1916, p. 226.)

Professor Lewis, who drafted the act, published a commentary (65 U. of Pa. Law Rev. p. 715) which appears as "Appendix B"* to this brief. (Appendices, pp. 6-25.) In this elaborate report it was pointed out that the evil of the existing statutes was chiefly that one who had, in good faith, attempted to limit his liability, but who had technically failed to do so, was held as a general partner, and that Section 11 had been specifically written into the new statute for the express purpose of remedying that evil, and bringing about a new condition where such drastic and inequitable results would not be possible.

Section 11 covers attempts—and under any act—not those which have succeeded, but those which have failed. Section 11 protects a person who erroneously believes what is not the fact, *i. e.,* that he is a limited partner in a limited partnership. It was not (as apparently con-

*Certain materials which might not otherwise be readily available to the court are reprinted and filed herewith under separate cover as appendices to this brief, being Appendix A, Appendix B and Appendix C.

tended) incorporated into the act for the benefit of persons who are actually members of a limited partnership organized under the act, *i. e.,* those who have complied with the provisions thereof. They *are* limited partners and are liable only as such. If this contention were correct, Section 11 would be meaningless and superfluous. As pointed out by the Circuit Court of Appeals, ample provision has been made in other portions of the act for the correction of errors in organization or for amendments. (Rec., 1012, 1013.)

The purpose of this act was to declare a new public policy and was the deliberate adoption by the State of Illinois of *a new and basic* principle.

This court has already laid down salutary principles for the construction of the Uniform Acts, which were expressly followed by the Circuit Court of Appeals. (Rec., 1018.) These principles need no reaffirmance.

The case of *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Company,* 239 U. S. 520, 526, 528-529, seems to have settled the law that in construing these Uniform Acts:

> (1) The real purpose if ascertainable, supersedes and repeals existing local statutes and court decisions, if in conflict with that real purpose.
>
> (2) That in ascertaining such real purpose the explanatory report of those who drafted the statute is to have great, if not controlling, weight.

Tested by these rules, Hecht and Finn were not general partners. *They believed, in good faith,* that they were limited partners in a limited partnership. As soon as they ascertained the possible error of that belief they immediately complied with Section 11 of the existing law, and thereby became discharged from being held as general partners. The Circuit Court of Appeals, therefore, both on the plain text of the act, and also upon the re-

vealed purpose of the new statute, could not have found otherwise than they did.

Hecht and Finn, if held as general partners, would have been so held because of a purely technical error. The operation of the old statutes was harsh and inequitable. The main purpose of the new statute was to relieve against such injustice and hardship. No other construction of Section 11 is possible.

There is nothing in present Illinois act which deprives a person who honestly believes himself to be limited partner of the benefits of Section 11 because his firm engages in the brokerage business. The policy to be pursued in regulating brokerage firms is not in issue. Counsel's suggestions in this connection are wholly immaterial.

Hecht and Finn were trustees under the Hecht-Finn trust agreement. They also occupied the dual position of being certificate holders under the Hecht-Finn trust agreement and limited partners under the limited partnership contract, but they were limited partners not because they were certificate holders, but because as individuals distinguished from certificate holders they made themselves limited partners in Marcuse & Co. They could have ceased to be certificate holders by transferring their certificates, but by doing so they would not have ceased to be limited partners.

True it is, that the certificate holders other than Hecht and Finn were neither general nor limited partners. They denied and here deny that they were anything other than certificate holders or *cestuis que trust* under the Hecht-Finn trust agreement, but the effort is to hold them to the liability of partners upon the ground that Hecht and Finn represented them in this firm. Hence, if Hecht and Finn were not liable as general partners those whom they represented could not be liable as general

partners, and, therefore, in so far as Section 11 is concerned, Vette, Zuncker, Regensteiner and the two Studebakers were entitled to the benefit of the tender and renunciation made by Hecht and Finn regardless of whether they joined in the tender or requested, directed or authorized it to be made on their behalf. The Circuit Court of Appeals has well said that,

> "Their connection with the partnership being thus traced through their representation by Hecht and Finn, it follows that if such representation would operate to charge them, they should in good conscience also have the benefit of whatever Hecht and Finn may have done which would bring relief from the charge." (Rec., 1014.)

These respondents have not, as asserted by petitioners, "disclaimed any necessity of returning profits." (Petition, p. 16.) What they did do was to indicate to Hecht and Finn that they would have to assume the responsibility of deciding whether they, as trustees, should make the tender and renunciation and how and in whose behalf it should be made. (Rec., 895-900.) Hecht and Finn made the tender and renunciation and paid $46,000 into court, "acting on behalf of themselves and each acting for himself individually, and also acting as trustees," and on behalf of all the beneficiaries under the Hecht-Finn trust (Rec., 890, 891), which, of course, was the thing for them to do.

Limited Partnership Certificate Contained No False Statement.

Petitioners' contention that the limited partnership certificate filed was false in that it did not set forth the names of these respondents or any statement of a contribution by them, is completely and effectively disposed of by the following recent decisions, as is also (spe-

cifically) the case of ***Buckley*** v. ***Bramhall*** (24 How. Prac. 456), relied on by petitioners.

Crehan v. *Megargel* (N. Y. Ct. of App. July 12, 1922. See opinion, pp. 26, 31-34, Appendix C hereto, 234 N. Y. 67, 76-80.

Crehan v. *Megargel* (N. Y. Sup. Ct. App. Div. 1922), 192 N. Y. S. 290, 297, 298.

See also *Lawrence* v. *Merrifield,* 42 N. Y. Sup. Ct. 36, affirmed 73 N. Y. 590.

Each of these cases involved the construction of a statute similar to the old Illinois Limited Partnership Act, the material provisions being precisely the same. In each, as in the opinion of the Circuit Court of Appeals, it was pointed out that it is "a matter of absolute indifference to the creditors in what manner the special partner received his money so long as it was paid into the capital of the firm."

General Partnership Law of Illinois.

On July 1, 1917, there also went into effect, in Illinois, the Uniform General Partnership Law. This was enacted under exactly the same circumstances. Among its provisions is one which provides that persons are partners, as to creditors, *only* if they are partners as between themselves. In Illinois, the law is and always has been that as between the partners, "partnership" is a question of intention. This statute was in effect during the entire time Marcuse and Company operated. The trust test under this law was well stated by the Circuit Court of Appeals, viz.:

> "The existence of a partnership between themselves may be tested by the query whether in case

of loss of the entire capital of the concern, and payment by Marcuse and Morris of its debts, they might have contributions from petitioners as in a partnership. Undoubtedly under the contractual relation here shown they could not." (Rec., 1017.)

If Marcuse had fallen heir to sufficient money to pay off the creditors of Marcuse & Co., could he maintain suit against Vette, Zuncker, Regensteiner, Clement Studebaker, Jr., or George M. Studebaker, to contribute to pay the partnership debts? Partners are liable to each other in contribution when one pays the partnership debt. This is universally true if they *are partners*. It is obvious that under these partnership articles Hecht and Finn were not the partners of Marcuse and that much less were Vette and the others partners of Marcuse.

Section 7 of the new Uniform General Partnership Act provides that except as provided by Section 16 of that act, persons who are not partners to each other are not partners as to third persons (Hurd's Rev. Stat. of Ill. 1921, Ch. 106a, Sec. 7), and Section 16 has no application to this case.

There never was any intention on the part of Hecht and Finn to become anything other than limited partners. There never was any intention on the part of any of the other respondents to become either general or limited partners. The only men who intended to become general partners in Marcuse & Co. were Marcuse and Morris. Under the law as it existed prior to the adoption of the Uniform Partnership Act in Illinois, the existence of a general partnership as between alleged partners was a question wholly of their intention to be gathered from their agreement and where there was a written and signed agreement on the subject the

partnership question must be determined from the language of the contract itself.

Fougner v. *First National Bank of Chicago*, 141 Ill. 125, 128.

Grinton v. *Strong*, 148 Ill. 587, 596.

Mayfield v. *Turner*, 180 Ill. 332, 336.

Hendricks v. *Webster* (C. C. A. 8), 159 Fed. 927, 929.

In re Haines & Co.'s Estate, 176 Pa. 354; 35 Atl. 237, 239.

Standard Sewing Machine Co. v. *Leslie* (C. C. A. 7), 78 Fed. 325, 328.

Goacher v. *Bates*, 280 Ill. 372, 376.

National Surety Co. v. *Townsend Brick, etc. Co.* 176 Ill. 156.

As to the matter of intention, etc., see

Ruling Case Law, Vol. 20, p. 831.

Phillips v. *Phillips*, 49 Ill. 437, 439.

Bushnell v. *Consolidated Ice Machinery Co.* 138 Ill. 67, 74, 75.

Grinton v. *Strong*, *supra*, p. 596.

Reed v. *Engel*, 237 Ill. 628, 631.

Goacher v. *Bates*, 280 Ill. 372, 376.

London Assurance Co. v. *Drennan*, 116 U. S. 461, 472.

Respondents never intended to become general partners with Marcuse and Morris, nor with each other. Vette, Zuncker, Regensteiner and the Studebakers never intended to become partners of any kind. There was no intention among all these people to become partners, hence they were not partners as to each other, and, therefore, under said Section 7 were not partners as to third persons. This is the plain mandate of the statute.

There being no actual partnership between any of the parties except the limited partnership with Marcuse and Morris as general partners and Hecht and Finn as limited partners, there can be no liability for the debts of the firm so far as respondents are concerned, because even if there was any ground in the record for the application of the doctrine of partnership by estoppel (which there is not), such a doctrine has no place in a bankruptcy proceeding.

In re Kaplan (C. C. A. 7), 234 Fed. 866.

In re Pinson & Co. et al. (Dist. Ct. Ala.), 180 Fed. 787, 789.

Jones v. *Burnham, etc.* (C. C. A. 3), 138 Fed. 986.

In re Clark (Dist. Ct. Wash.), 111 Fed. 893, 894.

Collier on Bankruptcy (11th Ed. 1917), p. 167.

The question as to whether or not one is a partner is to be decided by the rules of law relating to partnership unaffected by the Bankruptcy Act exactly as in any other court.

Francis v. *McNeal*, 228 U. S. 695, 700.

Collier on Bankruptcy (11th Ed. 1917), p. 167.

(c)

Section 6 (1) of the Uniform General Partnership Act adopted in 1917 provides that "A partnership is an association of two or more persons to carry on as co-owners a business for profit." (Hurd's Rev. St. of Ill. 1921, Ch. 106a, Sec. 6.)

The court will observe that the association must be for the purpose of and with the *intention* to

(a) carry on

(b) as co-owners

(c) a business for profit.

But,

(1) The certificate holders under the Hecht-Finn trust agreement did not form an association. They formed a trust modeled along the lines of a so-called "Massachusetts Trust." Authorities upon this point are cited under point (d) of this brief.

(2) Neither the certificate holders under the Hecht-Finn trust agreement nor Hecht and Finn nor any of them, formed an association with Marcuse and Morris "to carry on" this business. Section 6 relates to a general partnership. The words "to carry on" clearly contemplate an association in which each member is to participate in the carrying on, *i. e.,* managing and conducting the business. Limited partners do not carry on or manage, conduct or control a business. These things are done by the general partners. One who enters into or assists in forming an association to be composed of both general and limited partners, in which he is to be only a limited partner and have nothing to do with the management, conduct or control of the business, does not go into an association "to carry on" the business, for the business is to be carried on not by him or by him in conjunction with others, but by the general partners. Indeed, a limited partner must refrain from taking part in the management, conduct or control of the business for otherwise he might expose himself to the liability of a general partner and no one but Marcuse and Morris had any such intention.

(3) The certificate holders under the Hecht-Finn trust agreement were not co-owners. George M. Studebaker and Clement Studebaker, Jr., were not co-owners. The latter were not even certificate holders.

Section 6 of the Hecht-Finn trust agreement in lan-

guage as plain as could be used excludes the idea of the certificate holders being co-owners.

We quote:

> "The holders of trust certificates shall have no right, title or interest directory, proprietary or otherwise in said copartnership or in or to the property or assets of said copartnership, the entire right, title and interest therein and thereto both legal and equitable being vested in the trustees," etc. (Pet. Ex. 6, Rec. 372.)

HECHT-FINN TRUST DID NOT CREATE A PARTNERSHIP.

(d)

The Hecht-Finn trust agreement did not create a partnership either by its own terms or when read in connection with the limited partnership agreement between Marcuse, Morris, Hecht and Finn. The certificate holders as such were not partners either as between themselves or with Marcuse and Morris, but their relationship was with Hecht and Finn and was that of *cestuis que* trust.

Williams v. *Milton,* 215 Mass. 1, 10, 11; 102 N. E. 355, 358, 359.

Crocker v. *Malley,* 249 U. S. 223, 232, 233.

Mayo v. *Moritz,* 151 Mass. 481; 24 N. E. 1083.

Crehan v. *Megargel* (Jan. 20, 1922) 192 N. Y. S. 290.

Crehan v. *Megargel* (N. Y. Ct. of App. July 12, 1922), 234 N. Y. 67. (See Opinion, Appendix C, pp. 26-41.)

Crehan v. *Megargel et al.* 192 N. Y. S. 290.

Home Lumber Company v. *Hopkins,* 190 Pac. (Kan.) 601, 604.

Rhode Island Hospital Trust Co. v. *Copeland,* 98 Atl. (R. I.) 273, 279.

Johnson v. *Lewis* (C. C. Ark.), 6 Fed. 27, 28.
Wells-Stone Mercantile Co. v. *Grover,* 75 N. W. (N. D.) 911, 916.
Jones v. *Gould,* 209 N. Y. 419, 424.

RESPONDENTS' CONTENTION AS TO SUBPARTNERSHIP.

(e)

If the Hecht-Finn trust agreement created a partnership between Hecht and Finn and the other certificate holders thereunder it was a SUBPARTNERSHIP. Such certificate holders were not members of Marcuse & Co. and not liable as such.

Mechem's Elements of Partnership, 2nd Ed. 1920, p. 52.
Bates' Law of Partnerships, Vol. 1, pp. 168-170.
Parson on Partnership, p. 33.
Cyclopedia of Law & Procedure, Vol. 30, pp. 381, 382, 396.
Ruling Case Law, Vol. 20, pp. 1073, 1074.
Burnett v. *Snyder,* 76 N. Y. 344.
Burnett v. *Snyder,* 81 N. Y. 550.
Bybee v. *Hawkett* (C. C. A. 6), 12 Fed. 649.
Bank v. *Morris,* 43 Legal Intelligence (Pa.) 56.
Rockafellow v. *Miller,* 107 N. Y. 507.
O'Connor v. *Sherley,* 107 Ky. 70; 52 S. W. 1056.
Setzer v. *Beale,* 19 W. Va. 274, 287, 288.
Meyer v. *Krohn,* 114 Ill. 574, 581.
Crehan v. *Megargel* (N. Y. Sup. Ct., App. Div. 1922), 192 N. Y. S. 290, 299.

The Studebakers.

(f)

Clement Studebaker, Jr., and George M. Studebaker were not even certificate holders. Studebaker Bros. Trust was created by a document, copy of which is in evidence. (Rec., 795.)

It is an investment fund held under this trust instrument by a trustee for the ultimate benefit of various persons including, among others, Clement Studebaker, Jr., and George M. Studebaker. The money with which the certificate was purchased indisputably was that of Studebaker Bros. Trust. The purchase price was paid by its check. The legal title to the purchase money was in the trustee and as explained hereinabove the certificate issued for this money to Hoffman was thereafter surrendered and a new certificate issued to Gardner, one of the officials of this trustee, and that certificate was by him assigned and turned over to the trustee and held as a part of the assets of Studebaker Bros. Trust. (Rec., 835-839.)

On no possible theory of law could the two Studebakers be held to be partners either general or limited in the firm of Marcuse & Co.

Conclusion.

Last it is submitted, that there is no proper end of justice to be subserved by reopening this case.

The respondents, Hecht and Finn, supposed themselves to be special and limited partners.

The public supposed them so to be.

The creditors traded with the firm on that supposition.

The traders were not relying on any general liability, or personal credit, of Hecht and Finn.

The creditors never even heard of the other respondents—much less extended credit to the firm because of them.

All the respondents, including Hecht and Finn, are *heavy losers*—they suffered more from the firm's failure than did any of the creditors.

The ground on which Hecht and Finn and these respondents were sought to be held, has no basis in equity or substantial justice—it is based solely on an error of one day in filing—a highly technic. ground which injured no one.

The petition for certiorari should be denied.

Respectfully submitted,

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